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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. **7** 217

**PUBLIC UTILITIES COMMISSION OF RHODE ISLAND
AND NARRAGANSETT ELECTRIC LIGHTING
COMPANY,**

Petitioners,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
RHODE ISLAND.**

CHARLES P. SISSON,
Attorney General of the State of Rhode Island,
for PUBLIC UTILITIES COMMISSION OF RHODE ISLAND.

ROLAND W. BOYDEN,
ARTHUR M. ALLEN,
FRANK D. COMERFORD,
Counsel for NARRAGANSETT ELECTRIC LIGHTING COMPANY.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND
AND NARRAGANSETT ELECTRIC LIGHTING
COMPANY, PETITIONERS,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF
RHODE ISLAND.

*To the Honorable the Chief Justice and Associate Justices of the
Supreme Court of the United States :*

The petition of Public Utilities Commission of Rhode Island and Narragansett Electric Lighting Company respectfully shows to this Honorable Court as follows:

FIRST. Your petitioner, Public Utilities Commission of Rhode Island, hereinafter called "the Commission" was created by an act known as the Public Utilities Act passed by the General Assembly of the State of Rhode Island in 1912 being Chapter 795 of the Public Laws of Rhode Island of 1912 and Chapter 253 of the General Laws of Rhode Island of 1923. The act provides for hearings and investigations of certain matters by the Commission upon complaint filed with it or in certain cases upon its own motion and Section 21 of said act provides as follows:

"If upon such a hearing and investigation had under the provisions of this chapter, the commission shall find any existing rates, tolls, charges, or joint rate or rates of any

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public utility, to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this chapter, the commission shall have power to fix and order substituted therefor such rates, tolls, charges, or joint rates as shall be just and reasonable."

SECOND. Your petitioner, Narragansett Electric Lighting Company, hereinafter called "Narragansett Company", is a corporation organized and existing under the laws of the State of Rhode Island and is and for many years has been engaged in generating and delivering electricity in the State of Rhode Island largely for use by consumers within said state and has been granted (and now enjoys) rights, locations and franchises by the State of Rhode Island and the municipalities thereof and has at no time engaged in business outside the State of Rhode Island and has been granted no rights, locations or franchises outside the State of Rhode Island.

THIRD. The respondent, Attleboro Steam & Electric Company, hereinafter called "Attleboro Company", is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and engaged in the business of furnishing electricity to consumers in the City of Attleboro in said Commonwealth and in the vicinity thereof.

FOURTH. In 1917 the Attleboro Company made a contract dated May 8, 1917 (R. 256) with the Narragansett Company by which the Narragansett Company agreed to furnish current to the Attleboro Company at a specified rate, the current being transported by the Narragansett Company to the State line between Rhode Island and Massachusetts and there delivered to the Attleboro Company or to another Massachusetts corporation called the Seekonk Company acting as the agent of the Attleboro Company in transporting the current to Attleboro. This contract contained no provisions for increasing the rate under the circumstances existing and relied upon in this case for such increase. A schedule (R. I. P. U. C. No. 68, R. 275) stating the rate contained in this contract was filed with the Commission and approved by it (R. 390).

FIFTH. As a consequence of economic changes during the war the rate fixed by said contract became unjust, unreasonable, insufficient, unjustly discriminatory and preferential as compared with the rates charged the local consumers of the Narragansett Company in Rhode Island. The performance of the contract at the rate fixed therein was involving the Narragansett Company in a yearly operating loss without any return at all on its investment and it is not denied that if the Narragansett Company had been compelled to continue furnishing electricity to the Attleboro Company at the rate fixed by said contract, the loss from the operation of said contract would have an immediate and direct effect upon the consumers of the Narragansett Company in Rhode Island, and that accordingly the rate fixed by said contract was as against the Rhode Island consumers of the Narragansett Company unjust, unreasonable, insufficient, unjustly discriminatory and preferential. On April 6, 1921, therefore, the Narragansett Company for the purpose of establishing equality among its customers filed with the Commission a new schedule of rates (R. I. P. U. C. No. 101, R. 391) for current furnished to the Attleboro Company. On April 27, 1921, the Commission after an informal hearing at which the Attleboro Company appeared only to protest made an order approving the new schedule (R. 394). The Attleboro Company refused to pay the new rate.

SIXTH. The Attleboro Company in July, 1923, filed a bill in equity in the United States District Court for the District of Rhode Island against the Narragansett Company asking for a mandatory injunction requiring that the latter should continue to furnish current at the contract rate. After a full hearing and argument in October, 1923, the District Court in an opinion by District Judge Brown, filed February 12, 1924 (295 Fed. 895, Dist. Ct. Dist. R. I.), granted the injunction on the ground that the order approving the new rate was not authorized by the statute creating the Commission, Public Laws of 1912 c. 795 (Gen. Laws 1923, c. 253), because there had been no formal finding by the Commission after a formal hearing at which the Attleboro Company had had an opportunity to present its case that the contract rate was unreasonable and ought to be superseded.

SEVENTH. The Narragansett Company thereupon filed with the Commission a new schedule of rates (R. I. P. U. C. No. 125, May 7, 1924, R. 40). This new schedule which in terms cancelled Schedules No. 68 and No. 101 was calculated to give substantially the same return as Schedule No. 101 and to establish equality among the customers of the Narragansett Company but applied to all public utility customers purchasing more than a designated amount and was in other respects so prepared as to meet objections of form that might be made to Schedule No. 101. The Commission acting under Sections 26 to 28 of the statute, upon suggestion of the Narragansett Company ordered on its own motion an investigation of Schedule No. 125 and a public hearing with notice to the Attleboro Company and to the Narragansett Company and also to the general public by publication.

EIGHTH. In June, 1924, a formal public hearing was held. January 21, 1925, the Commission filed its opinion (R. 384) and made an order (R. 420) approving Schedule No. 125. In that opinion the Commission reviews and discusses the evidence at length and in the course thereof makes the following findings:

“ The Commission is satisfied that the method used and principles applied in the determination of costs . . . are correct; that upon the evidence before the Commission, it appears that the loss to the Narragansett Company resulting from the supply of electric energy to the Attleboro Company under Schedule #68, including a return of eight per cent. upon that part of its investment used in rendering such service, has been for the years 1918 to 1923, inclusive, as follows:”

(Between \$40,000 and \$60,000 each year; R. 399).

“ The Commission further finds upon the evidence, that the aggregate loss to the Narragansett Company from serving the Attleboro Company for the term of the contract under the contract rate and Schedule 68, after a return of 8% on the investment devoted to such Attleboro Company service, will be not less than \$1,500,000.00.

“ The evidence further shows and the Commission finds

that the method used and the principles applied in the determination of allocation of plant to the Attleboro service, the receipts from such service, the operating costs thereof, and the net financial results from the service rendered the Attleboro Company, are correct, . . . and that the result of such operation for the year 1923, shows that the Narragansett Company suffered an operating loss of not less than \$4,326.03, without any return whatever upon the investment devoted to such service. It also appears that the probable operating loss during the year 1924 to the Narragansett Company is not less than \$6,881.95, before any return upon investment." (R. 400.)

"The evidence further shows that the estimated annual net losses to the Narragansett Company for service under Schedule #68 after an 8% return on capital, for the remaining years of the contract, are as follows:"

(Between \$50,000 and \$146,000 each year; R. 400, 401.)

"In this particular case it appeared to the Commission at the time the schedule (*i.e.* No. 68) was submitted for approval that the supply of electric energy by the Narragansett Company to the Attleboro Company under the contract and schedule was to the mutual benefit of both companies, offering to the former a large consumer at an average profitable rate during the terms of the contract, and to the latter a dependable supply of energy at a cost which the latter company must have considered lower than its own cost would be under independent operation. The other consumers could also anticipate a lowered cost of production to the Narragansett Company by reason of the increased load upon the central station." (That within parentheses ours.)

"The principal reason for the loss to which the Narragansett Company is subjected with reference to this rate schedule and contract is due to the sudden, substantial and permanent increase in its average unit cost of generating plant, due to the increased costs which have followed the change of conditions resulting from the world war." (R. 402, 403).

IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 26, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Rhode Island is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8268)



"The evidence shows that there is no present reason to anticipate any reduction in such unit costs." (R. 404.)

"After a careful consideration of all the evidence the Commission is of the opinion and therefore finds that the rates contained in Schedule R. I. P. U. C. No. 68 are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the provisions of the Public Utilities Act in that the said rates, tolls and charges yield no return on the value of the property used by the Narragansett Company in rendering service to the Attleboro Company, while the rates, tolls and charges charged by the Narragansett Company to its other customers yield a fair return on the value of the property used for such service.

"The Commission further finds that a continuance of service to the Attleboro Company under said schedule No. 68, will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers." (R. 404.)

"In determining the value of the whole or any part of the investment or property of the Narragansett Company for the purpose of these findings the Commission has considered all relevant facts, including original cost, reproduction cost, money honestly and prudently invested, the par value of securities outstanding, the market value of securities outstanding, the sum required to meet operating expenses, and other facts which are relevant, all of which facts the Commission has, after investigation and hearing and considering all the evidence and arguments of counsel, carefully considered and to each of which it has given due weight.

"The Commission find that under present conditions a return of approximately 8% on the value of the investment devoted to the furnishing of service to the Attleboro Company is a reasonable return, and that considering all the evidence submitted, service by the Narragansett Company under Schedule R. I. P. U. C. No. 125, will yield to the Narragansett Company approximately 8% on the in-

vestment devoted by the Narragansett Company to the furnishing of such service.

"For all of the reasons hereinbefore stated the Commission finds that the rates contained in Schedule R. I. P. U. C. No. 125, are just, reasonable, sufficient and not unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act for the reason that such rates, tolls and charges yield a fair return and no more than a fair return on the value of the property used for such service, and that said rates should be substituted for the rates contained in Schedule R. I. P. U. C. No. 68." (R. 419.)

"It is therefore *Ordered*:

"(1) That the rates contained in Schedule R. I. P. U. C. No. 68 of the Narragansett Electric Lighting Company, are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act, and

"(2) That the rates contained in Schedule R. I. P. U. C. No. 125 of the Narragansett Electric Lighting Company are just and reasonable, and may be allowed to become effective on all electricity delivered on and after February 1, 1925." (R. 420.)

NINTH. The Attleboro Company thereupon filed in the Supreme Court of the State of Rhode Island being the highest court of said State in which a decision could be had, a claim of appeal under Section 34 of the statute creating the Commission for a reversal of the order of the Commission and also a petition for a writ of certiorari alleging doubt as to whether it had the right to appeal. By the claim of appeal of the Attleboro Company there was drawn in question the validity of said Public Utilities Act as well as also the validity of said order of the Commission made and entered pursuant to the provisions of said Act on the ground of such statute and/or order being repugnant to the Constitution of the United States. This is indicated by the fact that among the particulars relied upon by the Attleboro Company in its claim of appeal are the following (R. 424):

"5. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of improperly interfering with interstate commerce.

"6. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of the equal protection of the laws.

"7. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of its property without due process of law.

"8. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company.

"9. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order constitutes an improper interference with interstate commerce, so that the same is repugnant to the Constitution of the United States.

"10. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of depriving the Attleboro Company of the equal protection of the laws, so that the same is repugnant to the Constitution of the United States.

"11. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question,

said order has the effect of depriving the Attleboro Company of its property without due process of law, so that the same is repugnant to the Constitution of the United States.

"12. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company, so that the same is repugnant to the Constitution of the United States."

By the foregoing language contained in the claim of appeal it also appears that the Attleboro Company does especially set up and claim a title, right, privilege or immunity under the Constitution of the United States.

TENTH. The matter was heard by the Supreme Court of Rhode Island and the Supreme Court on June 18, 1925, rendered its opinion dismissing the writ of certiorari but sustaining the appeal of the Attleboro Company, and reversing the order of the Commission establishing the new rate set forth in Schedule No. 125, stating as the reason for its decision that the order of the Commission was an improper interference by the State with interstate commerce (R. 438). The relevant language of the opinion and that which indicates the reason for the Court's decision is as follows:

"The Attleboro Company challenges this order and claims it is unlawful and void on various grounds; the principal and decisive objection, in our judgment, is that said order is an improper interference by the State with interstate commerce."

And in referring to the case of *Missouri v. Kansas Gas Company* 265 U. S. 298 the court said in concluding its opinion:

"Applying the principles confirmed therein, we think that the action of the State commission imposes a direct

burden on interstate commerce and consequently is invalid. The intrastate and interstate business of the Narragansett Co. can be segregated. This separation has actually been made by that company and the Commission, in establishing a basis for the proposed new rate. The effect of the action of the Commission was direct on interstate commerce and incidental on local and State commerce. Such being the case there is no difference in principle because of the amount of interstate commerce involved, whether it is much or little, at wholesale or retail. The purpose of the state action is immaterial, if the result is to impose a direct burden on interstate commerce."

A final decree of said court sustaining said appeal and reversing said order on the grounds stated in said opinion was entered on July 22, 1925, and the title, right, privilege or immunity specially set up and claimed by the Attleboro Company was recognized and the Federal claim of the Attleboro Company was sustained.

ELEVENTH. Your petitioners are advised that said decision of the Supreme Court of Rhode Island is erroneous in holding that the order of said Commission was an improper interference by the State with interstate commerce and in refusing to recognize that the chief business of the Narragansett Company is its local business in Rhode Island and that the purpose of the regulation of the rates on the whole business of the company is not to regulate interstate commerce but to regulate the local public service, and that any incidental effect of such regulation upon interstate commerce is a necessary incident to the carrying out of such local public service regulations, and also in refusing to recognize that the Narragansett Company, a corporation created and existing under and by virtue of the laws of the State of Rhode Island is doing business exclusively in the State of Rhode Island and enjoying only the rights, locations and franchises granted to it by the State of Rhode Island and by the municipalities thereof.

Your petitioners are further advised that said Supreme Court of the State of Rhode Island has in deciding said case decided

a federal question of substance not theretofore determined by this Honorable Court and has decided it in a way probably not in accord with any decisions of this Court, which might be deemed applicable to the situation under consideration.

Wherefore your petitioners pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Rhode Island commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Court in the cause entitled "Attleboro Steam & Electric Company *v.* Public Utilities Commission, et al", being shown and designated in the indices and records of said Court as M. P. No. 436, to the end that the said cause may be reviewed and determined by this Court as provided by law, and your petitioners pray that the judgment of said Supreme Court of Rhode Island in the said cause may be reversed by this Honorable Court.

And your petitioners will ever pray.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND,
By CHARLES P. SISSON,

Attorney General of the State of Rhode Island.

NARRAGANSETT ELECTRIC LIGHTING COMPANY,

By ROLAND W. BOYDEN,

ARTHUR M. ALLEN,

FRANK D. COMERFORD,

Counsel.

STATE OF RHODE ISLAND,
COUNTY OF PROVIDENCE, SS.

Arthur M. Allen, being duly sworn, says that he is counsel for the petitioner, Narragansett Electric Lighting Company, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

ARTHUR M. ALLEN.

Sworn to and subscribed before me this
15th day of September, A. D. 1925.

CAROLINE L. MEYER,
Notary Public.

My commission expires

June 30, 1926.

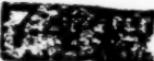
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WM. R. STANSB
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.  217

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BRIEF IN SUPPORT OF PETITION.

CHARLES P. SISSON,
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Counsel for NARRAGANSETT ELECTRIC LIGHTING COMPANY.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
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BRIEF IN SUPPORT OF PETITION.

STATEMENT OF GROUNDS FOR CERTIORARI.

1.

A final decree (R. 448) of the Supreme Court of the State of Rhode Island, being the highest court of said state in which a decision could be had, was entered on July 22, 1925 (R. 422), in the cause now sought to be certified for review and determination. The opinion in the court below (R. 438) was filed June 18, 1925 (R. 422).

2.

The following specific claims advanced by the Attleboro Steam & Electric Company in the lower court in its claim of appeal from the order of the Public Utilities Commission of Rhode Island are relied upon as the basis of this Court's jurisdiction (R. 424) :

"5. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act

is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of improperly interfering with interstate commerce.

" 6. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of the equal protection of the laws.

" 7. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of its property without due process of law.

" 8. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company.

" 9. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order constitutes an improper interference with interstate commerce, so that the same is repugnant to the Constitution of the United States.

" 10. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of depriving the Attleboro Company of the equal protection of the laws, so that the same is repugnant to the Constitution of the United States.

" 11. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of depriving the Attleboro Company of

its property without due process of law, so that the same is repugnant to the Constitution of the United States.

"12. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company, so that the same is repugnant to the Constitution of the United States."

The following rulings in the lower court are relied upon as the basis of this Court's jurisdiction:

" . . . the Court finds that said order is unlawful and invalid for the reasons stated in the opinion, and it is, therefore

Ordered, adjudged and decreed that said appeal be sustained, that said order be reversed and that the complaint or notice of investigation upon which said order was entered be dismissed. . . ." (R. 448.)

In the opinion it was stated (and these were the sole grounds advanced for the decision):

" . . . The Attleboro Co. challenges this order, and claims it is unlawful and void on various grounds; the principal and decisive objection, in our judgment, is that said order is an improper interference by the State with interstate commerce." (R. 442.)

" . . . The case at bar we think is like the Kansas case (referring to *Missouri v. Kansas Gas Co.*, 265 U. S. 298). Applying the principles confirmed therein, we think that the action of the State commission imposes a direct burden on interstate commerce and consequently is invalid. The intrastate and interstate business of the Narragansett Co. can be segregated. This separation has actually been made by that company and the Commission, in establishing a basis for the proposed new rate. The effect of the action

of the Commission was direct on interstate commerce and incidental on local and State commerce. Such being the case there is no difference in principle because of the amount of interstate commerce involved, whether it is much or little, at wholesale or retail. The purpose of the state action is immaterial, if the result is to impose a direct burden on interstate commerce." (R. 446.)

3.

The statutory provisions under which jurisdiction for a writ of certiorari is invoked are found in Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925, as follows:

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . . of . . . the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . ."

Your petitioners rely upon both grounds for sustaining jurisdiction, viz.:

- (a) That there was drawn in question the validity of a statute of the State of Rhode Island on the ground of its being repugnant to the Constitution of the United States, and
- (b) That a right, privilege, or immunity was specially set up or claimed by the Attleboro Steam & Electric Company.

4.

(a)

The following cases are believed to sustain jurisdiction for the reason that there was drawn in question *the validity of a statute* of a State on the ground of its being repugnant to the Constitution of the United States:

Red Cross Line v. Atlantic Fruit Company, 264 U. S. 109, 120.

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 289.
Atlantic Coast Line v. North Carolina Corporation Commission, 206 U. S. 1, 6.

Grand Trunk Ry. v. R. R. Commission of Indiana, 221 U. S. 400, 403 and cases cited.

Reinman v. Little Rock, 237 U. S. 171, 176.

Chicago, Milwaukee & St. Paul Ry. v. State Public Utilities Commission of Illinois, 242 U. S. 333.

Red Cross Line v. Atlantic Fruit Company is parallel to the instant case. Jurisdiction by certiorari was there upheld after the State court of last resort had decided that a State Arbitration Law excluded maritime contracts from its operation because the Federal Constitution so required. In that case, as in our present case, the state court held that the state statute was not applicable, not because the contract in question was not within the scope of the state statute as a matter of statutory construction, but because of the constitutional question involved. The following language from the opinion is in point:

"If that court (the New York Court of Appeals) had construed the Arbitration Law as excluding from its scope controversies which are within the admiralty jurisdiction, the construction given to the state statute would bind us; and there would be no occasion to consider the constitutional question presented. . . . An expression used by the Court of Appeals lends some color to respondent's contention, 233 N. Y. 373, 381. But a reading of the whole opinion shows that the state court excluded maritime contracts from the operation of the law, not as a matter of statutory

construction, but because it thought the Federal Constitution required such action. . . ."

In *Dahnke-Walker v. Bondurant* the State Court denied the Federal claim on the ground that the State statute as applied to a particular transaction was not, as the plaintiff seasonably insisted, repugnant to the commerce clause. On writ of error jurisdiction was challenged. Jurisdiction was sustained under the following clause of the Judicial Code, Sec. 237, as amended by Act of September 6, 1916 (39 Stat. 726):

". . . any suit . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity."

In that case it was a necessary fact that the decision in the State Court was in favor of the validity of the State statute only for the purpose of sustaining the jurisdiction in error. That aspect of the case does not concern us here because the power to review by certiorari may be exercised as well where the Federal claim is sustained as where it is denied. Judicial Code, Sec. 237 (b), *supra*. The fact decisive of jurisdiction in that case as in the instant case is that the validity of the State statute as applied in a particular transaction was drawn in question under the Constitution of the United States (*ante* pp. 1-3).

The Public Utilities Act of Rhode Island and particularly Section 21 of that Act (Appendix A, p. 42) is the statute the validity of which is herein drawn in question. But the jurisdiction may also be predicated upon the proposition that the order of the Commission was a statute within the meaning of Judicial Code, Sec. 237 (b), *supra*, and it cannot be denied that an order of the Commission was drawn in question on the ground of its being repugnant to the Constitution of the United States. The remaining cases cited above to sustain jurisdiction for the reason that the validity of a statute was drawn in question are relied upon only in support of the proposition that the order of the Commission was a statute within the meaning of Judicial Code, Sec. 237 (b).

(b)

The following cases tend to support jurisdiction for the reason that a *right, privilege or immunity* was specially set up or claimed under the Constitution of the United States:

Citizens National Bank v. Durr, 257 U. S. 99, 106-7;
Bullock v. R. R. Comm. of Florida, 254 U. S. 513, 518.

Satisfactory cases in support of jurisdiction by certiorari under the title, right, privilege or immunity clause of Section 237 (b) of the Judicial Code are not to be found because the reasons for granting or denying petitions for such writs are seldom given in the reports. Inasmuch as review by certiorari is not a matter of right but of sound judicial discretion there is ordinarily no occasion for the Court to discuss the question of jurisdiction unless the jurisdiction is challenged after the petition has been granted. *Citizens National Bank v. Durr* and *Bullock v. R. R. Comm. of Florida* were exceptional cases where writs of error were denied because the validity of state statutes were not drawn in question and writs of certiorari granted because a Federal claim of right, privilege or immunity was denied by the State Court.

On the question of jurisdiction it is important that the case was decided below on the Federal question. The fact that non-Federal grounds were included in the claim of appeal does not afford a basis for depriving this Court of jurisdiction.

St. Louis, Iron Mountain & Southern Ry. v. McWhirter, 229 U. S. 265, 276.

The special reasons relied upon to show that the state court has decided a Federal question of substance not theretofore determined by this Court and has decided it in a way not in accord with applicable decisions of this Court will be herein-after set forth in a concise statement of the case followed by an argument on the principles of law applicable to a decision of the Federal question.

STATEMENT OF THE CASE.

The Narragansett Electric Lighting Company (hereinafter the "Narragansett Company") was incorporated by a special act of the General Assembly of the State of Rhode Island passed May 29, 1884. (Laws of Rhode Island 1884, p. 29.) It has for forty years been engaged in a general electric lighting, heating and power business. By the act of incorporation and subsequent amendments thereto the State of Rhode Island has conferred upon the Narragansett Company certain special rights, locations and franchises and has authorized town and city councils within Rhode Island to grant corresponding rights, locations and franchises within their respective territorial limits. See, for example, the rights of eminent domain conferred by the amendatory Act of April 19, 1917. (Laws of Rhode Island, 1917, p. 341; Appendix B, pp. 46-49.) By an Act of April 29, 1918 (Public Laws of Rhode Island, 1918, p. 253), the Narragansett Company was authorized to acquire by lease, purchase or otherwise, the ownership or control of any right, property or franchise held by any person, corporation or association engaged in or authorized to engage in a business similar to that of the Narragansett Company and was authorized to give its securities in payment therefor. Many of the above-mentioned state and municipal grants of rights, locations and franchises have been given subject to regulation by general law or by order of city or town council as the case may be. In addition to the limitations by way of potential regulation attached to these specially granted rights, locations and franchises the Narragansett Company is subject to other limitations peculiar to general Rhode Island public utility corporations which exist by reason of the devotion by the company of its private property to public use within the State of Rhode Island. (Public Utilities Act of Rhode Island, General Laws of Rhode Island, 1923, Chapter 253; Appendix A, p. 39.) The Narragansett Company in 1923 supplied electrical current direct to 71,554 customers (R. 284, 287) within Rhode Island.

Attleboro Steam & Electric Company (hereinafter the "Attleboro Company") is a corporation organized and existing

under the laws of the Commonwealth of Massachusetts. It supplies electrical current for public and private use in the City of Attleboro and vicinity in Massachusetts.

Seekonk Electric Company (hereinafter the "Seekonk Company") is a corporation organized and existing under the laws of the Commonwealth of Massachusetts.

Public Utilities Commission of Rhode Island (hereinafter the "Commission") was created by an Act known as the Public Utilities Act passed by the General Assembly of the State of Rhode Island in 1912, being Chapter 253 of the General Laws of Rhode Island of 1923. (Relevant sections of that Act are set out in Appendix A of this brief, pp. 39-45.)

Early in the year 1916 negotiations were entered into between the Attleboro Company and the Narragansett Company looking to the sale by the Narragansett Company and the purchase by the Attleboro Company of electrical energy for a period of twenty years. These negotiations culminated in a triparty contract (R. 256-274) dated May 8, 1917, between the Narragansett Company, the Attleboro Company and the Seekonk Company, whereby the Attleboro Company was to purchase all the electricity required for its own uses and for sale in the City of Attleboro and adjacent territory from the Narragansett Company at a specified rate for a period of twenty years. The current was to be delivered at the State Line between the Town of East Providence, Rhode Island, and the Town of Seekonk, Massachusetts, and was to be metered on the transformers of the Attleboro Company at its generating plant in Attleboro. (R. 257-258.) The Narragansett Company then had and continues to have a sub-station at East Providence.

At no time either before or after the contract was entered into has the Narragansett Company qualified to do business in the Commonwealth of Massachusetts. It is not now and never has been engaged in business therein. Since its incorporation the Narragansett Company has been continuously engaged in a general electric lighting, heating and power business. Its generating plant is located at tide-water in the city of Providence, Rhode Island. It generates its electrical energy by steam

through the use of coal and oil as fuel. The chief business of the Narragansett Company is to supply electricity directly to customers in Rhode Island. About one thirty-fifth (1/35) of the total product of the Narragansett Company went to the Attleboro Company in 1923. (R. 87.) The Narragansett Company had 31,375 customers in 1917 and 71,554 in 1923. (R. 287.)

The contract rate was 8.57 cents per kilowatt hour. This rate was to be subject to increase or decrease for certain variations from a base price for coal. It was subject to decrease if any discovery, invention or improvement in electrical machinery should be made or any other method of generating or obtaining electrical energy should be discovered or adopted which would cause a material reduction in the cost of supplying electrical energy. Equitable adjustments were to be made when taxes imposed or removed materially increased or decreased the cost to the Narragansett Company of generating or otherwise obtaining or delivering electrical energy. The contract contained no provision for increasing the rate other than that which might result from an increase in the price of coal or from an apportionment of taxes.

The Narragansett Company on May 14, 1917, filed with the Commission its rate schedule R. I. P. U. C. No. 68 (R. 275), which stated the contract rate to the Attleboro Company, and requested the Commission to allow the contract to go into effect at once. By order No. 335, dated May 23, 1917 (R. 390), the Commission authorized the Narragansett Company to grant the special resale rate, shown in schedule R. I. P. U. C. No. 68, to the Attleboro Company.

As a consequence of economic changes wrought by the world war the contract became extremely burdensome to the Narragansett Company involving it in a yearly operating loss without any return whatever upon its investment. (R. 403.)

April 6, 1921, the Narragansett Company filed with the Commission schedule R. I. P. U. C. No. 101 (R. 391-393) which contained a new schedule of special rates for current furnished to the Attleboro Company. On April 27, 1921, the Commission, after a hearing, at which the Attleboro Company appeared only

to protest, made an order approving the new schedule. (Order No. 584; R. 395.)

The Attleboro Company refused to pay the new rate. The Narragansett Company threatened to cut off the current unless the new rate was paid. In July, 1923, the Attleboro Company filed a bill in equity in the United States District Court for the District of Rhode Island against the Narragansett Company, asking for a mandatory injunction that the latter should continue to furnish current at the contract rate. After a full hearing and argument in October, 1923, the District Court, in an opinion by Judge Brown, filed February 12, 1924 (*Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895; R. 1-22), granted the injunction, on the ground that the order approving the new rate was not authorized by the statute creating the Commission (Public Laws of Rhode Island 1912, c. 795; Gen. Laws, R. I. 1923, c. 253), because there had been no formal finding by the Commission, after a formal hearing at which the Attleboro Company had an opportunity to present its case, that the contract rate was unreasonable and ought to be superseded.

The Narragansett Company thereupon filed with the Commission a new schedule of rates. (Schedule R. I. P. U. C. No. 125, May 7, 1924; R. 251-252.) This new schedule of rates which in terms cancelled Schedules No. 98 (R. 274-276) and No. 101 (R. 391-393) was calculated to give substantially the same return as Schedule No. 101, but applied to all public utility customers purchasing more than a designated amount of current, and was in other respects amended and made more definite in order to meet objections of form that might be made to Schedule No. 101. The Commission, acting under Secs. 26-28 of the Public Utilities Act (see Appendix A, p. 42) upon suggestion of the Narragansett Company, ordered of its own motion in investigation of Schedule R. I. P. U. C. No. 125, at a public hearing, with notice by mail to the Narragansett Company and the Attleboro Company and by publication to the general public. (R. 27-35.)

In June, 1924, a formal public hearing was held. Counsel appeared for the Narragansett Company and for the Attleboro

Company. Testimony was taken and arguments made in behalf of both companies. (R. 47-187; 188-222. See also Exhibits, R. 223-345.)

January 21, 1925, the Commission filed its opinion (R. 384-420) and made an order (No. 876; R. 420) that the rates contained in Schedule R. I. P. U. C. No. 68 were unjustly discriminatory and in violation of the Public Utilities Act, that the rates contained in Schedule R. I. P. U. C. No. 125 were just and reasonable and were allowed to become effective on all electricity delivered on and after February 1, 1925.

The Commission in its opinion (R. 384-420) recited and discussed the evidence at length and made findings which may be summarized as follows:

1. At the time the contract was submitted to the Commission for approval in 1917 it appeared to the Commission that the contract would result to the mutual benefit of both companies. (R. 402.)

2. The Narragansett Company suffered in 1923 an operating loss of not less than \$4,326.03 without any return whatever upon the investment devoted to the Attleboro service and the probable operating loss in 1924 was \$6,881.95 before any return upon investment. (R. 400.)

3. The aggregate loss to the Narragansett Company from serving the Attleboro Company for the term of the contract at the contract rates (Schedule No. 68) after a return of 8 per cent on the investment devoted to such Attleboro Company service, will not be less than \$1,500,000. (R. 400.)

4. The principal reason for the loss to the Narragansett Company under the contract is due to the sudden, substantial and permanent increase in the average unit cost of generating plant due to the increased costs which have followed the change of conditions resulting from the world war. (R. 403.)

5. The rates contained in Schedule No. 68 (the contract rates) are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act of Rhode Island because they yield no return on the value of the property used by the Narragansett Company in rendering service to the Attleboro Company, while

the rates, tolls and charges made by the Narragansett Company to its other customers yield a fair return on the value of the property used for such service. (R. 404.)

6. A continuance of service to the Attleboro Company under Schedule No. 68 will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers. (R. 404.)

7. Under present conditions a return of approximately 8 per cent on the value of the investment devoted to the furnishing of service to the Attleboro Company is a reasonable return. (R. 419.)

8. Service by the Narragansett Company to the Attleboro Company under Schedule No. 125 will yield to the Narragansett Company approximately 8 per cent on the investment devoted by the Narragansett Company to the furnishing of such service. (R. 419.)

9. The rates contained in Schedule No. 125 are just, reasonable, sufficient and not unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act of Rhode Island for the reason that such rates, tolls and charges yield a fair return and no more than a fair return on the value of the property used for such service. (R. 419.)

10. The rates contained in Schedule No. 125 should be substituted for the rates contained in Schedule No. 68. (R. 419).

The Commission made the following statement of the method used by it in determining value of investment, upon the basis of which the above findings were made (R. 419) :

“ In determining the value of the whole or any part of the investment or property of the Narragansett Company for the purpose of these findings the Commission has considered all relevant facts, including original cost, reproduction cost, money honestly and prudently invested, the par value of securities outstanding, the market value of securities outstanding, the sum required to meet operating expenses, and all other facts which are relevant, all of which facts the Commission has after investigation and

hearing and considering all the evidence and arguments of counsel, carefully considered and to each of which it has given due weight."

The Attleboro Company prosecuted an appeal to the Supreme Court of Rhode Island from Order No. 876 (R. 420) of the Commission, challenging the order and claiming it to be unlawful and void on various grounds including the eight Federal grounds above quoted (pp. 1-3.).

On June 18, 1925, an opinion was handed down by Judge Stearns and a final decree was entered July 22, 1925 (Rec. 448), by the Supreme Court of Rhode Island reversing Order No. 876 of the Commission establishing a new rate as per Schedule No. 125 and sustained the appeal. The single ground for the decision was that Order No. 876 imposed a direct burden on interstate commerce and so constituted an improper interference by the State with interstate commerce upon authority of *Missouri v. Kansas Gas Co.*, 265 U. S. 298.

SPECIFICATION OF ASSIGNED ERRORS.

1. Ruling that Order No. 876 was an improper interference by the State with interstate commerce.
2. Refusal to recognize that the chief business of the Narragansett Company is its local business in Rhode Island.
3. Refusal to recognize that only a small fraction of the total product of the Narragansett Company is sold to the Attleboro Company and that a very much greater proportion of the total product is sold direct by the Narragansett Company to consumers in Rhode Island.
4. Refusal to recognize that the Narragansett Company does no business outside of Rhode Island, that it delivers no electricity outside of Rhode Island, and that only a small proportion of the total product of the Narragansett Company is ultimately used in Massachusetts.
5. Failure to give recognition to the findings of the Commission that
 - (a) The rates, tolls and charges made by the Narragansett Company to its other customers yield a fair return on the value of the property used for such other service.

(b) The contract rate was unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act of Rhode Island.

(c) A continuance of service to the Attleboro Company under the contract rate will be detrimental to the general public welfare and will prevent the Narragansett Company from performing its full duty towards its other customers.

(d) The rates contained in schedule No. 125 will yield a fair return and no more than a fair return on the value of the property used for the Attleboro service during the period of the contract.

(e) The rates contained in schedule No. 125 are just, reasonable, sufficient and not unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act of Rhode Island.

(f) The rates contained in schedule No. 125 should be substituted for the rates contained in schedule No. 68.

6. Failure to give recognition to the fact that the Narragansett Company is operating under rights, locations and franchises from the State of Rhode Island and the municipalities thereof and to the fact that the Narragansett Company has at no time engaged in business outside the State of Rhode Island and has not been granted and has not enjoyed rights, locations or franchises outside the State of Rhode Island.

7. Refusal to recognize that the Attleboro Company in making the contract was chargeable with knowledge of the limited contractual powers of the Narragansett Company and that the latter company was subject to continuous regulation by the Commission in the interest of the public welfare of the State of Rhode Island in the absence of assertion by Congress of its paramount power to regulate interstate commerce.

8. Refusal to recognize that order No. 876 is a regulation of local public service, that any incidental effect of such regulation upon interstate commerce was a necessary incident to the carrying out of such local public service regulation and consequently only an indirect burden on interstate commerce.

9. Refusal to recognize that the paramount interest is not national but local.

10. Refusal to recognize that this is not a case where equality of opportunity and treatment among the various communities and between the States concerned would be preserved by uniformity of governmental non-action but a case where the State should be free to prevent discrimination in a business essentially local.

ARGUMENT.

The argument will be presented under the following principal headings:

I. The order of the Commission does not constitute an improper interference by the State with interstate commerce.

II. The charter power of the Narragansett Company to contract with respect to rates was subject to and limited by the power of the Commission to fix reasonable rates and to substitute reasonable rates for unreasonable rates.

III. The contract rate here involved was peculiarly subject to regulation by the Commission because it constituted a sale price at the State Line as distinguished from a transportation rate in interstate commerce.

IV. All contracts made by Public Utilities with respect to rates are subject to regulation by the State in the exercise of its Police Power.

V. The contract rate is unjust and unreasonable and the Commission properly displaced that rate and substituted the new rate, which is just and reasonable.

VI. There is no question as to the jurisdiction of the Commission to make the order.

I.

The order of the Commission does not constitute an improper interference by the State with interstate commerce.

We concede that the sale of electric current by the Narragansett Company to the Attleboro Company is interstate commerce. The fact that the current is delivered by the Narragansett Company within the State of Rhode Island does not prevent the whole transaction from being interstate commerce.

Pennsylvania R. R. Co. v. Clark Coal Co., 238 U. S. 456, 465;

United Fuel Gas Co. v. Hallanan, 257 U. S. 277.

The sale may nevertheless be subject to regulation by Rhode Island. It is unnecessary to cite many cases on the general principle that a transaction may be interstate commerce and

yet subject to regulation by a state, in the absence of regulation by Congress.

Olsen v. Smith, 195 U. S. 332, 341;

Port Richmond Ferry Co. v. Hudson Co., 234 U. S. 317, 330;

Compare: *Sault St. Marie v. International Transit Co.*, 234 U. S. 333;

Bush v. Maloy, 45 Sup. Ct. R. 326;

Buck v. Kuykendall, 45 Sup. Ct. R. 324;

See: Annotations 7 A. L. R. 1094.

In *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23 (1920), the general principles are clearly laid down, and are applied to a sort of commerce similar to that here in question. In that case the Gas Company transported gas from Pennsylvania to points in New York, and sold directly to the consumer there. The Supreme Court of the United States held that the transmission and sale was interstate commerce, but that nevertheless the State of New York had power to regulate the sale by the Pennsylvania Company to local New York consumers and fix the rates.

The Court said:

"In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself." (Page 29.)

The Court goes on to quote the *Minnesota Rate Cases*, 230 U. S. 352, at 402:

"But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pend-

ing Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not importred that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power."

The Court then said with regard to the case before it:

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the Company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert

its superior power under the commerce clause of the Constitution." (Page 31.)

In *Mill Creek Coal Co. v. Public Service Commission*, 84 W. Va., 662; Public Utilities Rep. 1920A, 704, the Supreme Court of West Virginia applied the same principles to a case of the sale of electric current, where the situation was substantially the same as in the *Pennsylvania Gas Co.* case, the electric current being generated in Virginia and sold to local consumers in West Virginia.

The Court said:

"But, though interstate commerce is involved, the state is not necessarily deprived of the right to regulate and supervise under its police power. That which is attempted here is regulation of the rates at which electric power produced in Virginia shall be sold in West Virginia. It is settled law that the police power of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of the public health, morals, and safety. . . . And it is clear that the regulation of the rates of public utilities is for the public convenience and general welfare, and hence a proper exercise of the police power of the state. . . . (Page 672.)

"Congress has never asserted its paramount power over interstate transmission of electric power; hence it only remains to consider whether the regulation of rates at which electric current shall be sold is essentially local, or of such national importance as to require a general system or uniformity of regulation. The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance requiring uniformity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject matter conflicting state regulations respecting rates

ordinarily would result in discord and chaos. There are instances, however, when even in such cases the regulatory power of the state has been sustained. . . .

"In fixing the rates of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature." (Page 674.)

The distinction between rates of sale and of transportation will be considered hereinafter more at length in sub-division III of the argument, *infra* p. 30.

In *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298 (hereinafter called the *Missouri* case) the Court held that the transportation of gas from outside the State of Kansas by a foreign corporation and its sale to public service companies there by that corporation was interstate commerce of such a character that the rates at which the gas was sold could not be regulated by the Kansas Public Utilities Commission. This case is the only case at all near the present one, in which the power of a state to regulate interstate commerce, in the absence of congressional action, is denied. It is distinguishable from the present case.

The Court there said:

"The business of the Supply Company (the Kansas Natural Gas Co.) with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers." (Page 306.)

On this ground the case was distinguished by the Court from the *Pennsylvania Gas Co.* case.

The purpose of the regulative action by the State in the *Missouri* case was simply to keep down the price of gas brought from outside the State. The State had the right to regulate the local companies for the benefit of the local consumers, but not to regulate a foreign company doing exclusively an interstate wholesale business in that State.

These facts distinguish the *Missouri* case from the present case. If the Narragansett Company generated electricity wholly, or almost wholly, for use out of the State of Rhode

Island, the power of the Rhode Island Commission to fix the price, at which it should be sold for such use, might be doubtful. But the business of the Narragansett Company is principally local business in Rhode Island; and it is impossible for the Rhode Island Public Utilities Commission to exercise effectively its undoubted powers to regulate the rates for electricity furnished to local consumers, without also regulating the rates for other service furnished by the Narragansett Company. On that ground the regulation of such other service should be allowed, even though it does incidentally affect interstate commerce.

If the Narragansett Company is obliged to continue furnishing a large quantity of electricity to the Attleboro Company at a loss, it is evident that it cannot go on with its business without charging the local Rhode Island consumers more than the fair cost of the electricity furnished to them, and the power of the Commission to secure fair prices for such consumers will be nullified.

This would be unfortunate in the absence of Federal regulation especially where the regulation of rates by the State commissions has apparently been most satisfactory. It has been so pronounced by no less an authority than Secretary of Commerce Hoover in an address delivered June 17, 1925, before the National Electric Light Association upon the subject of "State versus Federal Regulation in the Transformation of the Power Industry to Central Generation and Interconnection of Systems". (Electrical World, vol. 85, pp. 1309, 1310; issue of June 20, 1925, No. 25.) Mr. Hoover said (1310):

"During the past year the Department of Commerce has been engaged upon a study into the effectiveness and the results of state regulation of the industry. Few people seem to realize the fullness, the extent and the authority of the regulation now in effect. It is scarcely necessary for me to say that there is either state or municipal regulation of the rates of electrical utilities in all but two of the states and of service in all but five of the states. The financial operations of such utilities are supervised and controlled in a large majority of the states. These prin-

ples are being rapidly extended over the few remaining states.

No one can survey the work of the State commissions and the instructive series of court decisions concerning their rulings as a whole without realizing that we are gradually developing a science of regulation and of understanding on one hand of the means of drawing the fine line between minimum rates to the people and on the other hand of such a reasonable profit to the industry as will stimulate its advancement. It is my belief from this investigation that the Public Service Commissions with very little just criticism are proving themselves fully adequate to control the situation. The laws as written in the state statute books are sufficient to protect both the public and the industry, the two parties to the utility contract."

The only judicial pronouncement on precisely this question is in the opinion of Judge Brown in the United States District Court, in Rhode Island, when this same controversy was before him (295 Fed. 895, 897; Rec. pp. 1, 3). Judge Brown said:

"As it is apparent that losses upon contracts for the delivery of electrical energy for use outside the state might affect the financial ability of the Narragansett Company to render service in Rhode Island at reasonable rates, and that there might thus result a discrimination in rates which would be unfavorable to residents of Rhode Island and favorable to the residents of Massachusetts engaged in the same lines of industry, we should be reluctant to accept the contention that, though the corporate capacity of the Narragansett Company to contract with citizens of Rhode Island is plainly limited and subject to legislative control through the Public Utilities Commission, yet in making contracts with corporations or citizens of contiguous or remote states for the supply of electricity generated in Rhode Island it is free from such control."

If there were any Federal commission having authority to regulate rates for the service in question, it would have exclusive jurisdiction to do so. Presumably it would allow the Nar-

ragansett Company to charge reasonably remunerative rates. But there is no such Federal commission. And the Massachusetts Public Service Commission is without authority to give relief, and would be so under the *Missouri* case, even if the electricity were delivered at a point inside of Massachusetts.

That the Kansas Commission, in the *Missouri* case, and the Massachusetts Commission here, should be without authority to regulate the sale at wholesale, to public utilities, of gas or electricity brought from without the state, but the Rhode Island Commission should have authority to regulate the sale of electricity generated in Rhode Island and destined for points outside the state, under the circumstances of the present case, is a perfectly reasonable distinction. The line between direct interference with interstate commerce, which is not allowed, and indirect interference as an incident of the exercise of the power of the state to regulate its local business, which is allowed in the absence of congressional action, can and should be drawn right here.

The fact that the chief business of the Narragansett Company is its local business in Rhode Island is the important point. The purpose of the regulation of the rates on the whole business of the Company, including the interstate service, is not to regulate interstate commerce, but to regulate the local public service, and the regulation of the interstate commerce is a necessary incident to the carrying out of that purpose.

If the Narragansett Company gave a local retail service to consumers in Massachusetts it would be subject to regulation as to such business by the Massachusetts Public Service Commission, under the *Pennsylvania Gas Co.* case, although such business would be interstate commerce. If it sold to public utility companies in Massachusetts who distributed to local consumers there, the rates for such local distribution would be subject to regulation. *Public Utilities Commission v. Landon*, 249 U. S. 236.

The *Missouri* case does not decide, nor intimate in any way, that the Narragansett Company, if it did both a retail business and a wholesale business to public utility companies in Massachusetts, might not be subject to regulation by Massachusetts

with respect to all its business, on the ground that, in order to render the regulation of the local business effective, the wholesale business of the same company within the state must also be regulated. It might well be, if the Narragansett Company actually entered the State of Massachusetts, and delivered its electricity there to both local consumers and public utility companies, that it would be subject to regulation by Massachusetts with respect to its whole business in Massachusetts. But that would be going much farther than is necessary in the present case, where the business of a Rhode Island company, which does not go out of Rhode Island, and which enjoys rights, locations and franchises only in Rhode Island, is being regulated by the Rhode Island Commission.

The regulation of the whole business of the Narragansett Company, including the interstate business, by the Rhode Island Commission, only incidentally affects interstate commerce; and such incidental effect upon interstate commerce does not invalidate the regulation. In the *Pennsylvania Gas Co.* case, the Court said:

"It may be conceded that the local rates may affect the interstate business of the Company but this fact does not prevent the State from making local regulations of a reasonable character." (Page 31.)

Even though the regulation of the interstate business here affects it more directly than in the *Pennsylvania Gas Co.* case, yet it affects it only indirectly, because the purpose of the regulation is the proper control of the local business, and the effect on the interstate business is only incidental to that purpose.

There is no claim here that any discrimination is made against the interstate service. In the following cases, where the transmission of gas between states was declared to be free from the burdens which the States attempted to impose, the interstate commerce was of a wholesale character, and there was discrimination against it because it was interstate:

Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229;
Penna. v. W. Va., 262 U. S. 553, 557;
United Fuel Gas Co. v. Hallanan, 257 U. S. 277.

So long as there is no discrimination against interstate commerce there is no necessity for uniform regulation by Congress nor for uniformity of governmental nonaction. But such necessity may exist where there is discrimination against interstate commerce. This was recognized in the *Missouri* case at page 310:

"Such uniformity, even though it be uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned. See, for example: *Welton v. Missouri*, 91 U. S. 275, 282; *Hall v. De Cuir*, 95 U. S. 485, 490."

A very logical and sound distinction can thus be taken between cases where the discrimination is against interstate commerce and where the discrimination is against local public service.

See: *People's Natural Gas Co. v. Public Service Comm.*, 279 Pa. 252, 265.

There are some additional facts which distinguish this case from the *Missouri* case. The Narragansett Company enjoys rights, locations and franchises from the State of Rhode Island and from the municipalities thereof which were granted for the purpose of enabling the Company to render public service to consumers within Rhode Island. (See, for example charter amendment of April 19, 1917; Laws of Rhode Island, 1917, pp. 341-378, Appendix B, p. 46). It enjoys no corresponding rights, locations and franchises in or from the Commonwealth of Massachusetts.

In the *Missouri* case the Supply Company was operating under no such rights, locations or franchises. On the contrary, it was a foreign corporation doing business in Kansas and Missouri where the regulations were sought to be imposed. These facts are succinctly stated in the concluding paragraph of the opinion as follows:

"That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Com-

pany is not so operating and is not made a party to these franchises by merely doing business with the franchise holders."

In our case the Narragansett Company is sought to be regulated in the interest of the public welfare by the State which incorporated it. It is sought to be regulated in a business which has been fostered by special concessions from that State and its municipalities during a period of forty years. During this whole period up to the time the contract with the Attleboro Company became effective in 1917, the Narragansett Company had confined itself to public service within the State of Rhode Island. Its business before 1917 was entirely local. The contention of the Attleboro Company is that the transaction in interstate commerce was essentially national. If the Narragansett Company were to discriminate between its customers in Rhode Island by charging insufficient rates in Providence might not this constitute cause for forfeiture of its franchises in other cities in Rhode Island? If so, might not the continued performance of the contract with the Attleboro Company at the contract rate, which the Commission has found to be insufficient and unjustly discriminatory, impair the rights, locations and franchises of the Narragansett Company? Can it be said that the transaction in interstate commerce was essentially national and not essentially local when the performance of the contract is made possible only by the exercise of local rights, locations and franchises which may be subjected to forfeiture by such performance?

II.

The charter power of the Narragansett Company to contract with respect to rates was subject to and limited by the power of the Commission to fix reasonable rates and to substitute reasonable rates for unreasonable rates.

The Public Utilities Act of Rhode Island (for pertinent extracts see Appendix A, p. 39) was enacted in 1912 and was in force when the contract was entered into in 1917 which purported to fix a rate to the Attleboro Company that was to con-

tinue in effect for a period of twenty years. Upon application to the Commission by the Narragansett Company an order of the Commission was procured on May 23, 1917, which authorized the Narragansett Company to grant the Attleboro Company the contract rate at the State Line between Rhode Island and Massachusetts. (Order No. 335; R. 390.)

The order provided that the said rate should be shown in Schedule No. 68 of the Narragansett Company. It avoided any mention of the period of time for which the contract rate was to be effective. The contract rate was authorized only because it was reasonable at the time it was authorized. (R. 401, 402, 403.) The mere fact that a Public Utility Commission has approved a certain rate schedule does not attach to that particular schedule any element of permanence. It does not mean even that the rate shall be free from regulation for the term fixed by the parties. The police power of the State cannot be so suspended.

Union Dry Goods Co. v. Georgia P. S. C., 248 U. S. 372.

The policy of the Public Utilities Act of Rhode Island would be defeated by inserting in the order approving the contract rate the period of time for which such approval was given since Section 21 (Appendix A, p. 42) of that Act gave the Commission after hearing and investigation power to order reasonable rates substituted for unreasonable rates and Sections 26 to 28 (Appendix A, pp. 42-43) gave the Commission power to proceed upon its own motion to institute such hearing and investigation. It is therefore necessary for the Narragansett Company to satisfy the Commission that the contract rate is reasonable whenever the contract rate is sought to be cancelled on the ground that it is unreasonable.

The basis for this limitation on the contractual power of the Narragansett Company by way of continual subjection of its rates to the test of reasonableness by the Commission is the interest of public welfare in the protection of customers of an electric lighting company which has dedicated its private property to public use. In consideration for such dedication the Narragansett Company has been granted various rights, loca-

tions and franchises. The dedication of private property to public use has occurred only within the State of Rhode Island and the consideration has moved entirely from the State of Rhode Island and its municipalities, but the dedication includes property used both for the Attleboro service and for other service of the Narragansett Company. A reasonable return upon the Attleboro service as well as upon the other service of the Narragansett Company can therefore properly be required of the Narragansett Company in the interest of public welfare by the State of Rhode Island.

There are also limitations upon the contractual power of the Narragansett Company which exist apart from statutory regulation of rates, such as (1) the lack of charter power to freely contract upon any and all terms which might be deemed expedient and (2) the subjection to forfeiture of special rights, locations or franchises enjoyed at the pleasure of the State of Rhode Island and/or its municipalities resulting from the peculiar nature of the respective grants of such rights, locations or franchises.

All of these limitations upon the contractual power of the Narragansett Company go to the reasonableness of the rate to which the Narragansett Company shall be entitled. They existed in 1917 and continue to exist at the present time. The Attleboro Company entered into the contract which purported to fix the rates for a period of twenty years chargeable with knowledge of and necessarily subject to all of such limitations and subject also to all reservations of power by the State of Rhode Island and by its municipalities.

Union Dry Goods Co. v. Georgia P. S. C., 248 U. S. 372.

III.

The contract rate here involved was peculiarly subject to regulation by the Commission because it constituted a sale price at the State Line as distinguished from a transportation rate in interstate commerce.

An unusual feature in our case is that the electrical current is delivered at the State Line. The Narragansett Company generates the current at its plant in Rhode Island, transmits it to the State Line, and there delivers it. The transaction is one of sale at the State Line by a Rhode Island Public Utility Company operating within the State of Rhode Island. The rate sought to be regulated is the sale price of a commodity at the State Line—not a transportation rate in interstate commerce. The sale price of a commodity is distinguishable from a transportation rate in interstate commerce in that the sale price of the commodity of a local public utility company is essentially of local concern, while a transportation rate in interstate commerce is essentially of national concern. The sale price alone does not require nor reasonably admit of uniformity of Federal regulation.

The distinction between a sale price and a transportation rate in interstate commerce is thus stated in *Mill Creek Coal & Coke Co. v. Pub. Ser. Comm.*, 84 W. Va. 662, 674:

“In fixing the rates of sale . . . as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was one owed both to citizens of Virginia and to the public in this state. But the two duties do not overlap as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the community. So long as the rate fixed is not discriminatory or confiscatory, but yields a fair return upon the valuation of the property, it throws no burden upon citizens of other communities or states. As said in *Re Pennsylvania Gas. Co.*, 225 N. Y. 397, respecting

the regulation of the sale of gas imported from another state: 'It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority acting for the nation as a whole will readily discern them.' A similar conclusion was reached in *Manufacturers' Light & Heat Co. v. Ott*, 215 Fed. 940. The local regulation stands until Congress occupies the field."

In *Missouri v. Kansas Gas Co.*, 265 U. S. 298, 309 (upon authority of which the Supreme Court of Rhode Island held that the order of the Commission constituted an improper interference by the State with interstate commerce), the sale was inseparably connected with transportation and delivery through the interstate pipe lines of the company sought to be regulated. The Court said:

"The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation."

IV.

All contracts made by Public Utilities with respect to rates are subject to regulation by the State in the exercise of its Police Power.

If the Rhode Island Public Utilities Commission is not precluded from changing the contract rate in this case by the Commerce Clause of the Constitution, it is well established that it is not so precluded by the prohibition against impairing the obligation of a contract, or the clauses of the Constitution guaranteeing equal protection of the laws and due process of law. All contracts of public utilities are subject to the

power of the States to regulate rates as a part of the police power. Here the law establishing the Public Utilities Commission was previous to the contract, although that point is not essential. The contention that the constitutional provision as to the equal protection of the laws and due process of law prevent a change in such contracts is disposed of by the cases dealing with the alleged impairment of contracts.

Union Dry Goods Co. v. Georgia P. S. Commission, 248 U. S. 372;
Producers Transportation Co. v. R. R. Commission, 251 U. S. 228, 232;
Law v. R. R. Commission, 184 Cal. 737, 195 Pac. 423, P. U. R. 1921, C. 156;
Mill Creek Coal Co. v. Pub. Service Commission, 84 W. Va. 662; 100 S. E. 557; P. U. R. 1920A, 704;
East Providence Water Co. v. Pub. Ut. Commission, Supreme Court of R. I., Apr. 6, 1925.

See quotations from these cases, and citations of other cases, in our brief before the Commission. (R. 361-364.)

V.

The contract rate is unjust and unreasonable, and the Commission properly displaced that rate, and substituted the new rate, which is just and reasonable.

Whether the regulation of the rates of a public utility is constitutional ultimately depends on whether the regulation is a reasonable exercise of the police power in the promotion of the public interest. In most cases as to rates, however, the question comes down practically to the issue whether the rates are reasonably compensatory.

The Legislature has declared that all rates collected by any public utility for any heat, light, water or power delivered or furnished shall be "reasonable and just". *Public Utilities Act* of 1912, c. 795, Sec. 38. (General Laws 1923, c. 253, Sec. 38.) See also Secs. 39 and 40. Appendix A, pp. 43-44.

The original contract rate is unreasonable at the present time.

The rates upon each class of business done by a public utility should be *reasonably compensatory for the service rendered, without regard to return obtained from other classes of business.*

This sort of question has generally been raised in cases where public service commissions have fixed rates, for a particular class of service, which were alleged to be not compensatory. The Supreme Court in recent cases of this kind has laid down the principle above stated.

Interstate Commerce Commission v. Union Pac. R. R.,
222 U. S. 541, 549;

Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585;
Vandalia R. R. Co. v. Schnull, 255 U. S. 113.

See quotations from these and other cases in our brief before the Commission. (R. 372-376.)

In that class of cases the argument for the validity of the rate established by the Commission was stronger than the present argument advanced against the authority of the Commission to raise the contract rate. The act of the State Commission might conceivably be upheld as long as the company was not prevented from getting a fair return on its entire business. Such a view seems to have been at one time held by the Supreme Court of the United States. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

But the Court in the *Northern Pacific Case*, above cited, repudiated any such doctrine, and denied that the *Willcox* case, or any other earlier cases, were to be considered as authority therefor. It is therefore unnecessary to deal with any cases earlier than the *Northern Pacific* case, which has been confirmed by the two latter cases above cited.

In the present case, the order of the Commission, acting under State authority, was attacked because it displaced as unreasonable a rate established by contract. The Supreme Court of Rhode Island was asked to declare reasonable a rate which the Commission had declared unreasonable.

In *Public Utilities Commission v. Wichita R. & L. Co.*, 268 Fed. 37, 41, 42, the Circuit Court of Appeals had before it a similar case, where an old contract rate was superseded, and

the Court declared the principle above stated, that the rates of each particular class of service must be reasonably compensatory for the service rendered.

Upon appeal to the Supreme Court of the United States, the decision was reversed (260 U. S. 48) on the ground that the appellant had not had a proper opportunity to contest the facts, and that there was no proper finding of the facts. There is nothing to show that the decree of the Circuit Court of Appeals would not have been affirmed if there had been a proper finding of the facts alleged. See a discussion of this case in our brief before the Commission. (R. 369-372.)

The case of *Wichita R. & L. Co. v. Court of Industrial Relations*, 113 Kan. 217, 214 Pac. 797, P. U. R. 1923D, 593, is not in point. In that case the Court held that the return from a certain contract was compensatory notwithstanding that the Commission had held it to be non-compensatory. But the ground of the decision was that the cost had decreased since the finding of the Commission and appeared at the trial in court to be so low that the contract was amply compensatory.

The case of *Arkansas Natural Gas Co. v. Arkansas R. R. Commission*, 261 U. S. 379, is also not in point, because there the statute provided that the Commission should have no jurisdiction to change existing contracts. These two cases are discussed in our brief before the Commission. (R. 377-379.)

In *Attleboro Co. v. Narragansett Co.*, 295 Fed. 895, 901, 902 (R. 14-16), Judge Brown said:

"In the records of the proceedings of the commission we find no sufficient statement of any finding made after hearing and investigation upon the question of the unreasonableness of the contract rate or of the reasonableness or propriety of the new rate, unless in the following recital:

"It appearing that a continuance of the operation of the terms of the rate contract between said companies would result in a loss to the petitioning company and would therefore discriminate against its other customers.'

"The finding that the contract was unprofitable and therefore discriminatory rested upon *ex parte* statement, and moreover is a non sequitur.

"That the initial return was low and that profit was expected during later years was stated in the defendant's application to the commission for approval of the contract rates. There was no finding that a present loss would result in rendering the contract as a whole unprofitable.

...
"Before a contract can be interfered with under the police power, it must appear that the contract does in some manner affect adversely the welfare of the public.

"There is nothing in the records to show that the defendant brought to the notice of the commission any evidence that the company would be unable to perform its full duty to the community whose interest it is the function of the committee to protect."

"Even if the commission had received an *ex parte* statement that a single contract was for the time being unprofitable, this was far from establishing the fact that the public interest had been injuriously affected."

From this it appears that the ground of Judge Brown's decision was that there was no proper finding of facts after a hearing.

See *Rivelli v. Providence Gas Co.*, 44 R. 1. 76; 115 Atl. 461.

There are now findings (R. 400 et seq. and our statement of facts, *ante* p. 8) after a full hearing, that the contract rate fails to pay the actual cost of the service, exclusive of any return on investment used in furnishing such service, and that the loss, instead of becoming less, will increase in future years. It necessarily follows that such rates are unjustly discriminatory, and impair the ability of the company to give service to the public at fair rates. The Commission expressly finds that a continuance of service under the contract rates "will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers". (R. 404.)

The evidence is fully reported in the record. The opinion of the Commission analyzes it carefully, and shows the manner in which its conclusions are reached. The arguments before the Commission of counsel on both sides (incorporated in the Record pp. 188-222) discuss the facts at length. It is unnecessary to consider here how far the findings of the Commission should have weight with the Court, for we are confident that the evidence not only supports, but necessarily leads to, such findings. It is undoubtedly the right of this Court to give its independent consideration to the facts as well as the law in the case, so far as is necessary to decide the constitutional points involved.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.

Bluefield Imp. Co. v. W. Va. Public Service Commission, 262 U. S. 679, 689.

We submit that the findings and the evidence go further than is necessary to support the order of the Commission superseding the contract rates. The Narragansett Company is entitled to receive on this class of business the same reasonable compensation for its service, including a return on its investment, as it is entitled to receive on its other business. But here an actual loss is shown, of a permanent nature, which on any theory renders the rate unreasonable. And when the Commission has properly cancelled the contract rate, and proceeds to fix a reasonable new rate, there is no suggestion in any of the cases that it should not determine the new rate on the same principles that would apply if there had never been any contract.

VI.

There is no question as to the jurisdiction of the Commission to make the order.

In deciding that the order of the Commission constituted an "improper interference *by the State* with interstate commerce" (italics ours; R. 442) the Supreme Court of Rhode Island shortly disposed of the claim then made by the Attleboro Company that the Commission had no jurisdiction to make the

order. The Commission derives all its authority from the State. The State has acted only through its Commission. How could it now be said that the Commission acted without authority from the State when it has been decided that the order constituted an interference by the State? If the Commission acted without authority the interference would not be by the State. Our contention is that the interference by the State through its Commission was not an *improper* interference by the State. The issue now is entirely on the Federal question.

Red Cross Line v. Atlantic Fruit Company, 264 U. S. 109, 120.

Even if it had not been decided by the State Court that the Commission had jurisdiction to make the order, an examination of the terms of the Public Utilities Act readily discloses the intent of the legislature. Sections 18 and 21 (Appendix A, pp. 41-42) give the Commission power to regulate "*any* of the rates" of any public utility. Section 2 defines a public utility as "*every corporation . . . that now or hereafter may own . . . or control any plant or equipment . . . within this state . . . for the production, transmission, delivery, or furnishing of gas, electricity . . . or power, either directly or indirectly to or for the public . . .*" Section 56 provides for liberal construction.

Moreover the order in question is within the purposes of the Act. There is no decision nor dictum of the Supreme Court of Rhode Island to the contrary. At the time the contract was made the property of the Narragansett Company was dedicated to public use only in Rhode Island where it had over 30,000 customers. It enjoyed no rights, locations or franchises and had no customers in Massachusetts. The contract was entered into by a Rhode Island public utility corporation having limited contractual powers. By the terms of the contract current was to be delivered at the State Line. The contract was submitted to the Commission for its approval and was not made effective until the Commission made an order authorizing the contract rate to be granted. (R. 390.) When the order increas-

ing the rates was made the Narragansett Company had over 70,000 local customers in Rhode Island. (R. 287.) It was not doing business in Massachusetts and had no property dedicated to public use in that State. The contract rate had then become unreasonable and discriminatory. If the Commission cannot establish reasonably compensatory rates for service to large customers like the Attleboro Company it cannot impose on the Narragansett Company rates which will be reasonable for the service rendered to consumers generally.

Respectfully submitted,

CHARLES P. SISSON,
Attorney General of the State of Rhode Island,
for PUBLIC UTILITIES COMMISSION OF
RHODE ISLAND.

ROLAND W. BOYDEN,
ARTHUR M. ALLEN,
FRANK D. COMERFORD,
Counsel for NARRAGANSETT ELECTRIC
LIGHTING COMPANY.

APPENDIX A.

GENERAL LAWS OF RHODE ISLAND, 1923, CHAPTER 253 (PUB. LAWS 1912, CH. 795).

Of the Public Utilities Commission and of the Regulation and Control of Public Utilities.

(3664)

Section 1. This chapter shall be known as the Public Utilities Act, and shall apply to the public utilities herein described and to the commission hereby created, and to the public utility corporations and persons herein mentioned and referred to.

(3665)

Sec. 2. The term "commission," when used in this chapter, means the public utility commission hereby created.

The term "commissioner," when used in this chapter, means one of the members of such commission.

The term "corporation," when used in this chapter, includes a corporation, company, association and joint stock company or association.

The term "person", when used in this chapter, includes an individual, corporation, and a firm or co-partnership.

The term "public utility," when used in this chapter, shall mean and embrace, and apply to every corporation, company, person, association of persons, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any railroad, or street railway within this state, or that now or hereafter may operate or do business as a common carrier within this state; and to every corporation, company, person, association of persons, their lessees, trustees or receivers, appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any plant or equipment, or any part of any plant or equipment, within this state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery, or furnishing of gas, electricity, water, light,

heat or power, either directly or indirectly to or for the public: *Provided*, that this chapter shall not be construed to apply to any public water works and water service owned and furnished by any city or town.

The term "common carrier," when used in this chapter shall mean and apply to and embrace all railroad corporations, street railway corporations, express companies, freight companies, freight line companies, dining-car companies, steam-boat, power-boat and ferry companies, and all persons and associations of persons whether incorporated or not, and their lessees, trustees and receivers, appointed by any court whatsoever, operating any agency for public use in the conveyance of persons or property within this state by land or by water, or both.

The term "railroad," when used in this chapter includes every railroad other than a street railway, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations, wharves and terminal facilities of every kind, used, operated, controlled, leased or owned by or in connection with any such railroad.

The term "street railway," when used in this chapter includes every railway by whatsoever power operated or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city or town, and including all switches, spurs, tracks, rights of trackage, subways, tunnels, stations, terminals, and terminal facilities of every kind, used, operated, controlled or owned, by or in connection with, any such street railway.

The terms "plant or equipment," when used in this chapter, shall mean and apply to and embrace all the real estate, easements, buildings, machinery, apparatus, devices, rolling stock and tangible property of whatsoever kind and nature, and wherever located, used, controlled, operated, leased or owned by a public utility in the conduct of the business thereof.

The term "service" is used in this chapter in its broadest and most inclusive sense.

(3666)

Sec. 3. There shall be a public utilities commission for the state, which commission shall be vested with and possessed of the powers and duties specified in this chapter, and also with all the powers necessary to enable said commission to carry out fully and effectually all the purposes of this chapter. . . .

(3681)

Sec. 18. Upon a written complaint made against any public utility by any city or town council, or by any corporation, or by any twenty-five qualified electors that any of the rates, tolls, charges or any joint rate or rates of any public utility are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever of any public utility, affecting or relating to the conveyance of persons or property or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power, or any service in connection therewith, or the conveyance of any telephone or telegraph message, or any service in connection therewith, is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained or is unsafe, or the public safety is endangered thereby, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, regulations, measurements, practice, act or service complained of shall be entered by the commission without a formal public hearing. When any complaint shall be made by twenty-five or more qualified electors, such complaint shall designate one of the complainants upon whom shall be served all notices, orders and citations required by this chapter to be served upon complainants.

(3683)

Sec. 20. The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place where and when such hearing and investigation will be held and such

matters considered and determined. Both the public utility and the complainant shall be entitled to be heard and appear by counsel, and shall have process to enforce the attendance of witnesses.

(3684)

Sec. 21. If upon such a hearing and investigation had under the provisions of this chapter, the commission shall find any existing rates, tolls, charges or joint rate or rates of any public utility to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this chapter, the commission shall have power to fix and order substituted therefor such rates, tolls, charges or joint rates as shall be just and reasonable.

(3689)

Sec. 26. Whenever the commission shall believe that any of the rates, tolls, charges, or any joint rate or rates, charged, demanded, exacted or collected by any public utility are in any respect unreasonable or unjustly discriminatory, or otherwise in violation of this chapter, or that any regulation, measurement, practice or act whatsoever of such public utility, affecting or relating to the conveyance of persons or property, or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power, or any service in connection therewith, or the conveyance of telephone or telegraph messages, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory; or that any service of such public utility is inadequate or cannot be obtained, or is unsafe, or the public safety is endangered thereby, or that an investigation of any matter relating to a public utility should, for any reason be made, it may on its own motion, summarily investigate the same with or without notice.

(3690)

Sec. 27. If, after making such summary investigation, the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested, a

statement notifying the public utility of the matters under investigation. Ten days after such notice have been given the commission may proceed to set a time and place for a hearing and investigation.

(3691)

Sec. 28. Notice of the time and place for such hearing and investigation shall be given to the public utility and to such other interested persons as the commission shall deem necessary, as provided in section twenty hereof, and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such hearing and investigation had been made on complaint.

(3697)

Sec. 34. Any public utility or any complainant, aggrieved by any order of the commission fixing any rate, toll, charge, joint rate or rates, or any order fixing any regulation, measurement, practice, act or service, may appeal to the supreme court for a reversal of such order on the ground that the rate, toll, charge, joint rate or rates, fixed in the order are unlawful or unreasonable, or that any such regulation, measurement, practice, act or service fixed in such order is unlawful or unreasonable.

(3702)

Sec. 39. If any public utility or any agent or officer of a public utility, as defined in this chapter, shall directly or indirectly by any device whatsoever, or otherwise charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in, or affecting or relating to, the transportation of persons or property between points within this state, or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveyance of telegraph or telephone messages, or for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force or established as provided herein or than it charges, demands,

collects, or receives from any other person, firm or corporation for a like and contemporaneous service, under substantially similar circumstances and conditions such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars for each offense.

(3703)

Sec. 40. If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense.

(3719)

Section 56. The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said commission. The commission shall have, in addition to the powers in this chapter specified, mentioned and indicated all additional, implied and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned and indicated. A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto. Each section of this chapter, and every part of each section, are hereby declared to be independent

sections, and the holding of any section or sections or part or parts thereof to be void, ineffective, or unconstitutional for any cause shall not be deemed to affect any other section or part thereof.

APPENDIX B.

LAWS OF RHODE ISLAND, 1917, pp. 341-348.

AN ACT IN AMENDMENT OF AN ACT, ENTITLED "AN ACT TO INCORPORATE THE NARRAGANSETT ELECTRIC LIGHTING COMPANY", PASSED AT THE MAY SESSION OF THE GENERAL ASSEMBLY, A. D. 1884, AND THE SEVERAL ACTS IN AMENDMENT THEREOF AND RELATING THERETO.

Approved April 19, 1917.

It is enacted by the General Assembly as follows:

Section 1. The Narragansett Electric Lighting Company, a corporation created by an act of the general assembly, passed at its May session, A. D. 1884, and engaged in a general electric lighting, heating and power business, and for that purpose owning, leasing or controlling lines of a voltage of 11,000 volts or more for the transmission of electricity, is hereby authorized and empowered to complete or extend any such lines of a voltage of eleven thousand volts or more as it may from time to time own, lease or control, or any lines of such voltage operated or designed to be operated in connection therewith by acquiring and taking from time to time such additional lands and interests, estates and rights in lands (but not including the right to acquire or take under the provisions of this act any water power) as it may from time to time require for any such lines of the aforesaid voltage or for completing or extending any of the same and in the manner herein-after provided: *Provided, however,* that all rights under this act in the city of Providence are hereby confined to the location of such lines extending from the power station of the Narragansett Electric Lighting Company on the westerly side of the Providence river generally southerly and then across said river to a point (detailed description follows) . . . but nothing herein contained shall be construed as granting said corporation any right to locate

any of the same in, over or across any street or highway in said city; *and provided, further*, with respect to the taking of any portion of the land, location or right of way of any railroad, street railway or other public service company in said city, that said rights shall be subject to the provisions of Section 3 of this act; *and provided, further*, that said rights in the city of Providence shall be exercised within two years from and after the passage of this act and not thereafter; *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands that shall have been acquired or may hereafter be acquired by any city or town for municipal or public purposes, except in such reasonable locations as may be approved by the city council of such city or the town council of such town: *Provided, further*, that said corporation shall not take under the provisions of this act any portion of any public street or highway of any town or city in this state or any other lands or interests, estates or rights in lands that shall have been acquired by any town or city in this state for municipal or public purposes, except in such reasonable locations as may be approved by the town council or city council of such town or city, respectively; and that said corporation shall not take under the provisions of this act, any lands, interests, estates or rights in lands in any town or city in said state except in such reasonable locations as may be approved by the town council or city council of such town or city, respectively; *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands in the town of East Providence lying southerly on a line running from a point on the shore of the Providence river (detailed description follows) . . . *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands after the expiration of ten years from and after the date of the passage of this act.

Sec. 2. Whenever said corporation desires to take any

lands, interests, estates or rights therein it may proceed to acquire the right to use such land and to acquire such estate or easement in such land as it may deem necessary for its said corporate purposes in the following manner; said corporation shall present a petition to the superior court of the State of Rhode Island, in the county where such right, easement or estate is required, setting forth the right, easement or estate required, the name or names of the owner or owners (then follow details of procedure for hearing on the petition). . . . (Page 344.)

(Page 345:)

At the time fixed for said hearing the said court if it shall find the use and taking of the right, easement or estate mentioned in said petition to be necessary for its said corporate purposes shall thereupon appoint three disinterested persons resident of the county, commissioners to assess and appraise the damages. . . .

(Page 347:)

Sec. 3. Nothing in this act shall authorize the Narragansett Electric Lighting Company to condemn any portion of the land, location or right of way of any railroad, street railway or other public service company, except for the purpose of crossing the same either above or below grade and of maintaining suitable and convenient supports for such crossing, in such manner as not to render unsafe, or to impair the usefulness of such land, location or right of way for railroad or street railway purposes or the purposes of such public service company. If said corporation and any such railroad, street railway or public service company are unable to agree as to the method and manner of the construction and maintenance of any such crossing, either may apply to the public utilities commission for a determination thereof, and, after hearing, such crossing shall be constructed and maintained in such method and manner as may be ordered by said commission. Either party aggrieved by such order of said commission may appeal to the supreme court in the manner provided by

Section 34 of the public utilities act. Said corporation shall be liable to any such railroad, street railway or public service company for such damages and reasonable expense as may result to it by reason of any line of said corporation crossing such railroad, street railway or public service company's land, location or right of way.

Sec. 4. Said corporation may convey any such transmission line or any part thereof or right or interest therein, and the rights acquired for the same, to any other corporation, company or association having the right to carry on the electric light, heat or power business in the town or city where such line or part thereof is located, or may enter into an agreement giving to any such corporation, company or association the right to use any such line or part thereof, or agreeing to transmit electricity for any such corporation, company, or association over such line or part thereof.

Sec. 5. The act incorporating said Narragansett Electric Lighting Company and the various amendments thereto are hereby amended in accordance with the provisions of this act.

Sec. 6. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect from and after its passage.



OCT 11 1926

WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 217.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND
AND NARRAGANSETT ELECTRIC LIGHTING
COMPANY,
Petitioners,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF RHODE ISLAND.

BRIEF FOR PETITIONERS.

CHARLES P. SISSON,
Attorney General of the State of Rhode Island,
for PUBLIC UTILITIES COMMISSION OF RHODE ISLAND.

ROLAND W. BOYDEN,
ARTHUR M. ALLEN,
ROLAND GRAY,
FRANK D. COMERFORD,

Counsel for NARRAGANSETT ELECTRIC LIGHTING COMPANY.



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SUPREME COURT OF THE UNITED STATES

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No. 217.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND
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COMPANY, PETITIONERS,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF RHODE ISLAND.

BRIEF FOR PETITIONERS.

PETITION FOR CERTIORARI GRANTED.

This Court on October 26, 1925, granted your petitioners application for a writ of certiorari to review a decision of the Supreme Court of Rhode Island. (No. 741, October Term, 1925; 269 U. S. 546; 46 Sup. Ct. Rep. 103; R. 450).

OPINION OF COURT BELOW NOT YET REPORTED.

The opinion of the court below, filed June 18, 1925 (R. 447), has not yet been officially reported, but appears in the Record at page 438 and in 129 Atlantic Reporter 495.

STATEMENT OF GROUNDS FOR JURISDICTION.

The final decree of the Supreme Court of Rhode Island which is now to be reviewed was entered on July 22, 1925 (R. 448).

Jurisdiction is grounded on Judicial Code Section 237 (b)

as amended by Act of February 13, 1925 (43 Statutes at Large 936) and upon specific federal claims advanced and a ruling made in the court below. The Supreme Court of Rhode Island held that a certain order of the Public Utilities Commission of Rhode Island constituted an improper interference by the State with interstate commerce. The specific Federal claims advanced, the ruling made and the statutory provisions under which jurisdiction is invoked are quoted below.

SPECIFIC FEDERAL CLAIMS.

The following are the specific Federal claims advanced by the Attleboro Steam & Electric Company in the lower court in its claim of appeal from the order of the Public Utilities Commission of Rhode Island (R. 424) :

"5. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of improperly interfering with interstate commerce.

"6. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of the equal protection of the laws.

"7. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect of depriving the Attleboro Company of its property without due process of law.

"8. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, the act is as applied to the present case repugnant to the Constitution of the United States in that it has the effect

of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company.

"9. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order constitutes an improper interference with interstate commerce, so that the same is repugnant to the Constitution of the United States.

"10. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of depriving the Attleboro Company of the equal protection of the laws, so that the same is repugnant to the Constitution of the United States.

"11. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of depriving the Attleboro Company of its property without due process of law, so that the same is repugnant to the Constitution of the United States.

"12. If the Public Utilities Act purports to give the Commission jurisdiction to make the order in question, said order has the effect of impairing the obligation of the contract between the Attleboro Company and the State of Rhode Island implied in the Commission's approval of the rate specified in the above-mentioned contract between the Attleboro Company and the Narragansett Company, so that the same is repugnant to the Constitution of the United States."

RULING OF RHODE ISLAND COURT.

"... the court finds that said order is unlawful and invalid for the reasons stated in the opinion, and it is, therefore,

Ordered, adjudged and decreed that said appeal be sus-

tained, that said order be reversed and that the complaint or notice of investigation upon which said order was entered be dismissed . . ." (R. 448.)

In the opinion it was stated (and this was the sole ground advanced for the decision) :

" . . . The Attleboro Co. challenges this order and claims it is unlawful and void on various grounds; the principal and decisive objection, in our judgment, is that said order is an improper interference by the State with interstate commerce." (R. 442.)

" . . . The case at bar we think is like the *Kansas* case (referring to *Missouri et al. v. Kansas Gas Co.*, 265 U. S. 298). Applying the principles confirmed therein, we think that the action of the State commission imposes a direct burden on interstate commerce and consequently is invalid. The intrastate and interstate business of the Narragansett Co. can be segregated. This separation has actually been made by that company and the Commission, in establishing a basis for the proposed new rate. The effect of the action of the Commission was direct on interstate commerce and incidental on local and State commerce. Such being the case there is no difference in principle because of the amount of interstate commerce involved, whether it is much or little, at wholesale or retail. The purpose of the state action is immaterial, if the result is to impose a direct burden on interstate commerce." (R. 446-447.)

STATUTORY PROVISIONS AND GROUNDS FOR JURISDICTION.

The statutory provisions under which jurisdiction for a writ of certiorari is invoked are found in Section 237 (b) of the Judicial Code as amended by Act of February 13, 1925, as follows (43 Statutes at Large 936, 937) :

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review

and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution . . . of . . . the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . .”

Your petitioners rely upon both grounds for invoking jurisdiction, viz.:

- (a) That there was drawn in question the validity of a statute of the State of Rhode Island on the ground of its being repugnant to the Constitution of the United States, and the Federal claim was sustained;
- (b) That a right, privilege, or immunity was specially set up or claimed by the Attleboro Steam & Electric Company under the Constitution of the United States and the Federal claim was sustained.

The following cases are believed to sustain jurisdiction:

- Red Cross Line v. Atlantic Fruit Company*, 264 U. S. 109, 120;
- Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 288-289;
- Live Oak Water Users' Association et al. v. Railroad Commission of California*, 269 U. S. 354, 356;
- Grand Trunk Western Ry. v. Railroad Commission of Indiana*, 221 U. S. 400, 403, and cases cited;
- Reinman v. Little Rock*, 237 U. S. 171, 176;
- Citizens National Bank v. Durr et al.* 257 U. S. 99, 106-107.

STATEMENT OF THE CASE.

The Narragansett Electric Lighting Company (hereinafter the "Narragansett Company") was incorporated by a special act of the General Assembly of the State of Rhode Island passed May 29, 1884. (Laws of Rhode Island 1884, p. 29; Appendix B (a), *post*, pp. 88-89.) It has for forty-two years been engaged in a general electric lighting, heating and power business. By the act of incorporation and subsequent amendments thereto the State of Rhode Island has conferred upon the Narragansett Company certain special rights, locations and franchises and has authorized town and city councils within Rhode Island to grant corresponding rights, locations and franchises within their respective territorial limits. See, for example, the rights of eminent domain conferred by the amendatory Act of April 19, 1917. (Laws of Rhode Island, 1917, p. 341; Appendix B (b), *post*, pp. 90-93.) By an Act of April 29, 1918 (Laws of Rhode Island, 1918, p. 253; Appendix B (c), *post*, pp. 94-95), the Narragansett Company was authorized to acquire by lease, purchase or otherwise, the ownership or control of any right, property or franchise held by any person, corporation or association engaged in or authorized to engage in a business similar to that of the Narragansett Company and was authorized to give its securities in payment therefor. Many of the above-mentioned state and municipal grants of rights, locations and franchises have been given subject to regulation by general law or by order of city or town council as the case may be. In addition to the limitations by way of potential regulation attached to these specially granted rights, locations and franchises the Narragansett Company is subject to other limitations peculiar to general Rhode Island public utility corporations which exist by reason of the devotion by the company of its private property to public use within the State of Rhode Island. (Public Utilities Act of

Rhode Island, General Laws of Rhode Island, 1923, Chapter 253; See Appendix A, *post*, p. 75.) The Narragansett Company in 1923 supplied electrical current direct to 71,554 customers (R. 284, 287).

Attleboro Steam & Electric Company (hereinafter the "Attleboro Company") is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. It supplies electrical current for public and private use in the City of Attleboro and vicinity in Massachusetts.

Seekonk Electric Company (hereinafter the "Seekonk Company") is a corporation organized and existing under the laws of the Commonwealth of Massachusetts.

Public Utilities Commission of Rhode Island (hereinafter the "Commission") was created by an Act known as the Public Utilities Act passed by the General Assembly of the State of Rhode Island in 1912, being Chapter 253 of the General Laws of Rhode Island of 1923. (Relevant sections of that Act are set out in Appendix A of this brief, *post*, pp. 75-87.)

Early in the year 1916 negotiations were entered into between the Attleboro Company and the Narragansett Company looking to the sale by the Narragansett Company and the purchase by the Attleboro Company of electrical energy for a period of twenty years. These negotiations culminated in a triparty contract (R. 256-274) dated May 8, 1917, between the Narragansett Company, the Attleboro Company and the Seekonk Company, whereby the Attleboro Company was to purchase all the electricity required for its own uses and for sale in the City of Attleboro and adjacent territory from the Narragansett Company at a specified rate for a period of twenty years. The current was to be delivered at the State line between the Town of East Providence, Rhode Island, and the Town of Seekonk, Massachusetts. From the State line the current is carried by the Seekonk Company's transmission lines in Massachusetts and metered at the transformers of the Attleboro Company at its generating plant in Attleboro. (R.

257-258.) The Narragansett Company then had and continues to have a sub-station at East Providence.

At no time has the Narragansett Company qualified to do business in the Commonwealth of Massachusetts or engaged in business therein. It has always been continuously engaged in a general electric lighting, heating and power business to customers in Rhode Island. Its generating plant is located at tide-water in the City of Providence, Rhode Island. It generates its electrical energy by steam through the use of coal and oil as fuel. In 1923 about one thirty-fifth (1/35) of the total product of the Narragansett Company went to the Attleboro Company, its only customer outside of Rhode Island. (R. 87.) The Narragansett Company had 31,375 customers in 1917 and 71,554 in 1923. (R. 287.)

The contract rate was 8.57 mills per kilowatt hour. (R. 264.) This rate was to be subject to increase or decrease for certain variations from a base price for coal. It was subject to decrease if any discovery, invention or improvement in electrical machinery should be made or any other method of generating or obtaining electrical energy should be discovered or adopted which would cause a material reduction in the cost of supplying electrical energy. Equitable adjustments were to be made when taxes imposed or removed materially increased or decreased the cost to the Narragansett Company of generating or otherwise obtaining or delivering electrical energy. The contract contained no provision for increasing the rate other than that which might result from an increase in the price of coal or from an apportionment of taxes.

The Narragansett Company on May 14, 1917, filed with the Commission its rate schedule R. I. P. U. C. No. 68 (R. 31-32; 275), which stated the contract rate to the Attleboro Company, and requested the Commission to allow the rate to go into effect at once. By order No. 335, dated May 23, 1917 (R. 390), the Commission authorized the Narragansett Company to grant the special resale rate, shown in schedule R. I. P. U. C. No. 68, to the Attleboro Company.

As a consequence of economic changes wrought by the world war the contract became extremely burdensome to the Narragansett Company involving it in a yearly operating loss without any return whatever upon its investment. (R. 400-403.)

April 6, 1921, the Narragansett Company filed with the Commission schedule R. I. P. U. C. No. 101 (R. 33-34; 391-393) which contained a new schedule of special rates for current furnished to the Attleboro Company. On April 27, 1921, the Commission, after a hearing, at which the Attleboro Company appeared only to protest, made an order approving the new schedule. (Order No. 584; R. 394-395.)

The Attleboro Company refused to pay the new rate. The Narragansett Company threatened to cut off the current unless the new rate was paid. In July, 1923, the Attleboro Company filed a bill in equity in the United States District Court for the District of Rhode Island against the Narragansett Company, asking for a mandatory injunction that the latter should continue to furnish current at the contract rate. After a full hearing and argument in October, 1923, the District Court, in an opinion by Judge Brown, filed February 12, 1924 (*Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895; R. 1-22), granted the injunction, on the ground that the order approving the new rate was not valid, because there had been no formal finding by the Commission, after formal notice and hearing, that the contract rate was unreasonable and ought to be superseded.

The Narragansett Company thereupon filed with the Commission a new schedule of rates. (Schedule R. I. P. U. C. No. 125, May 7, 1924; R. 29-30; 251-252; 395.) This new schedule of rates which in terms cancelled Schedules No. 68 (R. 275-276) and No. 101 (R. 391-393) was calculated to give substantially the same return as Schedule No. 101, but applied to all public utility customers purchasing more than a designated amount of current, and was in other respects amended and made more definite in order to meet objections of form that might be made to Schedule No. 101. (R. 23-26.) The Com-

mission, acting under Section 48 of the Public Utilities Act (see Appendix A, *post*, p. 85) upon suggestion of the Narragansett Company, ordered of its own motion an investigation of Schedule R. I. P. U. C. No. 125, at a public hearing, with notice by mail to the Narragansett Company and the Attleboro Company and by publication to the general public. (R. 27-42.)

In June, 1924, a formal public hearing was held. Counsel appeared for the Narragansett Company and for the Attleboro Company. Testimony was taken and arguments made in behalf of both companies. (R. 47-187; 188-222. See also Exhibits, R. 223-345.)

January 21, 1925, the Commission filed its opinion (R. 384-420) and made an order (No. 876; R. 420) that the rates contained in Schedule R. I. P. U. C. No. 68 were unjust, unreasonable, insufficient and unjustly discriminatory and in violation of the Public Utilities Act, that the rates contained in Schedule R. I. P. U. C. No. 125 were just and reasonable and were to become effective on all electricity delivered on and after February 1, 1925.

The Commission in its opinion (R. 384-420) recited and discussed the evidence at length and made findings which may be summarized as follows:

1. At the time the contract was submitted to the Commission for approval in 1917 it appeared to the Commission that the contract would result to the mutual benefit of both companies (R. 402-403.)

2. The Narragansett Company suffered in 1923 an operating loss of not less than \$4,326.03 without any return whatever upon the investment devoted to the Attleboro service and the probable operating loss in 1924 was not less than \$6,881.95 before any return upon investment. (R. 400.)

3. The aggregate loss to the Narragansett Company from serving the Attleboro Company for the term of the contract at the contract rates (Schedule No. 68) after a return of 8 per cent on the investment devoted to such Attleboro Company service, will not be less than \$1,500,000. (R. 400.)

4. The principal reason for the loss to the Narragansett Company under the contract is the sudden, substantial and permanent increase in the average unit cost of generating plant due to the increased costs which have followed the change of conditions resulting from the world war. (R. 403.)

5. The rates contained in Schedule No. 68 (the contract rates) are unjust, unreasonable, insufficient and unjustly discriminatory and preferential, and in violation of the Public Utilities Act of Rhode Island because they yield no return on the value of the property used by the Narragansett Company in rendering service to the Attleboro Company, while the rates, tolls and charges made by the Narragansett Company to its other customers yield a fair return on the value of the property used for such service. (R. 404.)

6. A continuance of service to the Attleboro Company under Schedule No. 68 will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers. (R. 404.)

7. Under present conditions a return of approximately 8 per cent on the value of the investment devoted to the furnishing of service to the Attleboro Company is a reasonable return. (R. 419.)

8. Service by the Narragansett Company to the Attleboro Company under Schedule No. 125 will yield to the Narragansett Company approximately 8 per cent on the investment devoted by the Narragansett Company to the furnishing of such service. (R. 419.)

9. The rates contained in Schedule No. 125 are just, reasonable, sufficient and not unjustly discriminatory or preferential, or in violation of any of the provisions of the Public Utilities Act of Rhode Island for the reason that such rates, tolls and charges yield a fair return and no more than a fair return on the value of the property used for such service. (R. 419.)

10. The rates contained in Schedule No. 125 should be substituted for the rates contained in Schedule No. 68. (R. 419.)

Several of these findings are quoted verbatim under heading V of the Argument, *post*, pp. 62-64.

The Commission made the following statement of the method used by it in determining value of investment, upon the basis of which the above findings were made (R. 419) :

"In determining the value of the whole or any part of the investment or property of the Narragansett Company for the purpose of these findings the Commission has considered all relevant facts, including original cost, reproduction cost, money honestly and prudently invested, the par value of securities outstanding, the market value of securities outstanding, the sum required to meet operating expenses, and other facts which are relevant, all of which facts the Commission has after investigation and hearing and considering all the evidence and arguments of counsel, carefully considered and to each of which it has given due weight."

The Attleboro Company prosecuted an appeal to the Supreme Court of Rhode Island from Order No. 876 (R. 420) of the Commission, challenging the order and claiming it to be unlawful and void on various grounds.

On June 18, 1925, an opinion (R. 438) was handed down by Judge Stearns and a final decree was entered July 22, 1925 (129 Atl. 495; R. 448), by the Supreme Court of Rhode Island reversing Order No. 876 of the Commission which established the new rate (Schedule No. 125) and sustaining the appeal. The single ground for the decision was that Order No. 876 imposed a direct burden on interstate commerce and so constituted an improper interference by the State with interstate commerce upon authority of *Missouri et al. v. Kansas Gas Co.*, 265 U. S. 298.

The Public Utilities Commission of Rhode Island and the Narragansett Company brought in this Court a petition for a writ of *certiorari* to the Supreme Court of Rhode Island to review the above-mentioned decree and on October 26, 1925, this Court granted the petition. (269 U. S. 546; 46 Sup. Ct. Rep. 103; R. 450.)

SPECIFICATION OF ASSIGNED ERRORS.

1. Ruling that Order No. 876 was an improper interference by the State with interstate commerce.
2. Refusal to recognize that the chief business of the Narragansett Company is its local business in Rhode Island.
3. Refusal to recognize that only a small fraction of the total product of the Narragansett Company is sold to the Attleboro Company and that a very much greater proportion of the total product is sold direct by the Narragansett Company to consumers in Rhode Island.
4. Refusal to recognize that the Narragansett Company does no business outside of Rhode Island, that it delivers no electricity outside of Rhode Island, and that only a small proportion of the total product of the Narragansett Company is ultimately used in Massachusetts.
5. Failure to give recognition to the findings of the Commission that
 - (a) The rates, tolls and charges made by the Narragansett Company to its other customers yield a fair return on the value of the property used for such other service.
 - (b) The contract rate was unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act of Rhode Island.
 - (c) A continuance of service to the Attleboro Company under the contract rate will be detrimental to the general public welfare and will prevent the Narragansett Company from performing its full duty towards its other customers.
 - (d) The rates contained in schedule No. 125 will yield a fair return and no more than a fair return on the value of the property used for the Attleboro service during the period of the contract.
 - (e) The rates contained in schedule No. 125 are just,

reasonable, sufficient and not unjustly discriminatory or preferential, or in violation of any of the provisions of the Public Utilities Act of Rhode Island.

(f) The rates contained in schedule No. 125 should be substituted for the rates contained in schedule No. 68.

6. Failure to give recognition to the fact that the Narragansett Company is operating under rights, locations and franchises from the State of Rhode Island and the municipalities thereof and to the fact that the Narragansett Company has at no time engaged in business outside the State of Rhode Island and has not been granted and has not enjoyed rights, locations or franchises outside the State of Rhode Island.

7. Refusal to recognize that the Attleboro Company in making the contract was chargeable with knowledge of the limited contractual powers of the Narragansett Company and that the latter company was subject to continuous regulation by the Commission in the interest of the public welfare of the State of Rhode Island in the absence of assertion by Congress of its paramount power to regulate interstate commerce.

8. Refusal to recognize that Order No. 876 is a regulation of local public service, that any incidental effect of such regulation upon interstate commerce was a necessary incident to the carrying out of such local public service regulation and consequently only an indirect burden on interstate commerce.

9. Refusal to recognize that the paramount interest is not national but local.

10. Refusal to recognize that this is not a case where equality of opportunity and treatment among the various communities and between the States concerned would be preserved by uniformity of governmental non-action but a case where the State should be free to prevent discrimination in a business essentially local.

SUMMARY OF ARGUMENT.

The argument will be presented under the following principal headings:

- I. The order of the Commission is not an improper interference with interstate commerce (p. 16).
- II. The fact that the old rates were embodied in a contract does not prevent regulation by the Commission. In fact both companies understood that the Commission would exercise authority over the contract (p. 41).
- III. The Rhode Island Public Utilities Act as applied to the Attleboro Company is not unconstitutional as depriving the Attleboro Company of the equal protection of the laws (p. 50).
- IV. The Commission had jurisdiction to make the order to which objection is taken (p. 56).
- V. The Commission had power to fix for service to the Attleboro Company a rate yielding a reasonable profit on that service, and any less rate would be an unlawful discrimination (p. 62).
- VI. The order of the Commission is supported by the evidence (p. 73).

ARGUMENT.

I.

THE ORDER OF THE COMMISSION IS NOT AN IMPROPER
INTERFERENCE WITH INTERSTATE COMMERCE.

The sale of electric current by the Rhode Island Company to the Massachusetts Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the State line. The sale may nevertheless be subject to regulation by Rhode Island, in the absence of congressional action on the subject.

It is often said that whether interference with interstate commerce by a State, in the absence of Federal legislation, is allowable or not, depends on whether the interference is *direct* or *indirect*. While the correctness of this statement is indisputable, the distinction between direct and indirect interference is impossible to define in general terms, and in many cases difficult to apply; often it seems to be a matter of degree.

Another rule is constantly laid down by this Court, which is frequently of more practical value in determining whether the interference by the State is proper or improper.

" . . . there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government *because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies*. . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable

provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power." (Italics ours.)

Minnesota Rate Cases, 230 U. S. 352, 402-403.

"The rule which the plaintiff in error invokes is not an arbitrary rule, with arbitrary exceptions, but is one that has its basis in a rational construction of the Commerce Clause. As repeatedly stated, it denies authority to the States in all cases where the subject is of such a nature as to demand that, if regulated at all, its regulation should be through a general or national system, and that it should be free from restraint or direct burdens save as it is constitutionally governed by Congress; and on the other hand, *as to those matters which are distinctly local in character* although embraced within the Federal authority, the rule recognizes the propriety of the reasonable exercise of the power of the States, in order to meet the needs of suitable local protection, until Congress intervenes." (Italics ours.)

Wilmington Transportation Co. v. R. R. Comm. of California, 236 U. S. 151, 154-155.

In *Port Richmond and Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County*, 234 U. S. 317, a New York corporation ran a ferry between New Jersey and New York. A New Jersey county board prescribed the rates for transportation from New Jersey to New York. This Court held that this was not an improper interference with interstate commerce.

". . . the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power. . . . It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local in-

stances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency." (Page 332.)

In that case there was a regulation of rates—not a provision for the public safety such as often has been allowed where a regulation of rates was forbidden—and the rates were for interstate transportation, a matter which in general is less appropriate for local regulation than is the sale of commodities. (On this point see authorities quoted below pp. 34-40.) In *Sault Ste. Marie v. International Transit Co.*, 234 U. S. 333, it was held that a State could not impose a license tax on the operation of a similar ferry, although the tax was not found to be unreasonable. A license tax may be no more direct an interference with commerce than the regulation of rates, but its purpose and nature is inherently different.

In the present case, the Rhode Island Commission has regulated the charges made by the Narragansett Company, a Rhode Island public utility, for electricity sold to the Attleboro Company, and delivered at the State line, for use in Massachusetts. The regulatory order establishes rates for customers taking more than a certain amount of current of a particular character. As applied to the Attleboro Company (which is in fact the only customer at present falling within this class) the order has the effect of increasing the rates established by a contract made between the Narragansett Company and the Attleboro Company.

Much the greater part of the business of the Narragansett Company is the furnishing of electric current to consumers in Rhode Island.

The Commission found that the Narragansett Company was suffering a net operating loss in furnishing electricity to the Attleboro Company at the contract rate, without reckoning any return upon its investment, and a very large loss taking into account a proper return on its investment. (R. 399-400, and statement of facts, *ante*, p. 10.) The decision of the Commission continues:

"The Commission further finds that a continuance of service to the Attleboro Company under said schedule No. 68 [the contract rate] will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers." (R. 404.)

There is no discrimination against interstate commerce or the Attleboro Company; and the rates established are in themselves reasonable. So far as these points are not admitted by the Attleboro Company, they will be noticed below. They are not involved in the principal argument for that Company. Nor does that argument depend on the existence of a previous contract as to rates. The power to regulate rates, where it exists at all, includes the power both to lower and to raise existing rates, and the existence of a contract does not usually affect this power; that it does not do so in the present case will be shown below. See heading II p. 41. The main contention of the Attleboro Company is that any action of the Commission in regulating the rates for sale of current destined for use outside the State is an improper interference with interstate commerce.

It is believed that the present case is the first to come before this Court concerning the distribution of electric current. In *Mill Creek Coal & Coke Co. et als. v. Public Service Commission*, 84 W. Va. 662; 100 S. E. 557; P. U. R. 1920 A, 704, the Supreme Court of West Virginia treated the transmission and sale of electric current by a public utility company as analogous to the transmission and sale of gas, and this view is generally accepted. The only difference which might have any bearing on the present case is that with gas (at least natural gas), as with water and oil, the principal element of the cost of furnishing it to a customer is the cost of transportation, while with electricity the principal element is the cost of generating the current.

In *Pennsylvania Gas Co. v. Public Service Commission et al.*, 252 U. S. 23, brought before this Court by writ of error to

the Court of Appeals of the State of New York, a gas company, incorporated in Pennsylvania, transported natural gas from Pennsylvania to points in New York and sold it directly to local consumers there. The New York Public Service Commission established rates for such sales, and its action was upheld by the State Court. The Court said:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipelines and directly furnished to consumers in another State, is interstate commerce. . . ." (Page 28.)

Nevertheless the action of the New York Commission in fixing rates was upheld. The Court said:

"In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself." (Page 29.)

The Court then quoted from the *Minnesota Rate cases*, including the passage quoted above, and further said:

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the Company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always sub-

ject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution." (Page 31.)

The Pennsylvania Company does not appear to have carried on any wholesale business in New York.

In *Mill Creek Coal & Coke Co. et als. v. Public Service Commission*, 84 W. Va. 662; 100 S. E. 557; P. U. R. 1920 A, 704, the West Virginia Court applied the same principles to a case of the sale of electric current, where the situation was substantially the same as in the *Pennsylvania Gas* case, the electric current being generated in Virginia and sold to local consumers in West Virginia.

In the present case it is impossible for the Rhode Island Commission to exercise effectively its power to regulate the rates for electricity furnished to local consumers, without also regulating the rates for other service furnished by the Narragansett Company. On that ground the regulation of such other service should be allowed, even though it incidentally affects interstate commerce.

If the Narragansett Company is obliged to continue furnishing electricity to the Attleboro Company at a loss, that obligation will tend to increase the burden on the local consumers, and to impair the ability of the Company to give good service at fair prices to such consumers.

The question is whether there exists, under all the circumstances of the present case, a sufficient occasion for state regulation of rates, notwithstanding the fact that there is some interference with interstate commerce. As Congress has not legislated on the subject, the point practically at issue is whether it is on the whole better that there should be *state regulation or no regulation at all*.

Apart from other circumstances favoring the power of the State of Rhode Island to regulate rates in this case the fact that the Rhode Island Commission cannot secure proper service at fair prices to the local customers of the Narragansett

Company unless it has the power to regulate the rates for electricity furnished to the Attleboro Company, and any other future customers of the same class, shows by itself the practical necessity for regulation of these rates.

The fundamental principle in public utility rate regulation is that each class of customers shall contribute fairly to the expenses, and to the return upon the capital, of the utility. If one does less than his fair share, others must do more than their fair share. The discrimination which otherwise results is clearly brought out by the Supreme Court of West Virginia in the recent case, above cited, in which the Court said, referring to the contention that a price fixed by contract was beyond the power of the Commission to increase:

"That would result in discrimination of the worst type, when the service rendered by a utility is required by law to be without discrimination. The Commission might authorize a rate, which, according to its estimate, would yield a reasonable return, but those who were so fortunate as to possess contracts with the utility would be entirely without the scope of such order, and would pay for the service at a rate lower than is paid by those subject to the Commission's order. The resulting difference between the estimated and actual yield would necessarily be made up by a still higher rate to be paid by those not holding such contracts."

Mill Creek Coal & Coke Co. v. Pub. Serv. Commission,
84 W. Va. 662, 678; 100 S. E. 557; P. U. R. 1920
A, 704, 719-720.

"The fixing of rates by a public utility with a part of the public often affects the rest of the public. If service to some of the public is furnished at less than a proper cost, it is quite probable that others dependent on the public utility may suffer either from inadequate or too expensive service."

East Providence Water Co. v. Public Utilities Commission et al., 128 Atl. 556, 558 (R. I.).

". . . any contract that the city of Charlotte may have for a lower rate must yield to the public interest and requirement as expressed in this authoritative judgment of the Commission.

"Not only is the judgment of his Honor sustained by the principle more directly involved, but any other ruling in its practical application would likely and almost necessarily offend against the principle which forbids discrimination on the part of these companies towards patrons in like condition and circumstance. If a *quasi-public* company of this kind could evade or escape regulation establishing fixed rates that are found to be reasonable and just by making long-time contracts or other [*sic*], this regulation might be made to operate in furtherance of the very evil it is in part designed to prevent."

Re Southern Public Utilities Co., 179 N. C. 151, 161; 101 S. E. 619; P. U. R. 1920 C, 907, 918.

The reason why discrimination in favor of one customer is objectionable is that it tends to cast a greater burden on other customers.

State regulation by means of public service commissions already extends to many sorts of interstate commerce conducted by public utilities, which might be regulated by Congress. See, for instance, the *Pennsylvania Gas* case and the *Mill Creek Coal Company* case, *supra*. There is nothing to show that state regulation works badly with respect to the business of furnishing electrical power. On the contrary, the present Secretary of Commerce, Mr. Hoover, has pronounced it satisfactory, in an address delivered June 17, 1925, before the National Electric Light Association upon the subject of "State versus Federal Regulation in the Transformation of the Power Industry to Central Generation and Interconnection of Systems". (Electrical World, vol. 85, pp. 1309, 1310; issue of June 20, 1925, No. 25.) Mr. Hoover said:

"During the past year the Department of Commerce

has been engaged upon a study into the effectiveness and the results of state regulation of the industry. Few people seem to realize the fullness, the extent and the authority of the regulation now in effect. It is scarcely necessary for me to say that there is either state or municipal regulation of the rates of electrical utilities in all but two of the states and of service in all but five of the states. The financial operations of such utilities are supervised and controlled in a large majority of the states. These principles are being rapidly extended over the few remaining states.

"No one can survey the work the the State commissions and the instructive series of court decisions concerning their rulings as a whole without realizing that we are gradually developing a science of regulation and of understanding on one hand of the means of drawing the fine line between minimum rates to the people and on the other hand of such a reasonable profit to the industry as will stimulate its advancement. It is my belief from this investigation that the Public Service Commissions with very little just criticism are proving themselves fully adequate to control the situation. The laws as written in the state statute books are sufficient to protect both the public and the industry, the two parties to the utility contract." (Page 1310.)

In the case of companies doing principally a local business, it is obvious that the regulation of rates can be better made by a local authority than by a Federal commission. The situation in such cases resembles in many respects *Port Richmond and Bergen Point Ferry v. Board of Chosen Freeholders of Hudson County*, 234 U. S. 317. See the passage quoted above, pp. 17-18, from page 332 of the opinion in that case. The rates there regulated were for transportation, a subject less suited to local regulation than the sale of commodities.

When this same controversy, at an earlier stage (see state-

ment of facts p. 9, *supra*), came before the District Court in Rhode Island, Judge Brown said:

"As it is apparent that losses upon contracts for the delivery of electrical energy for use outside the state might affect the financial ability of the Narragansett Company to render service in Rhode Island at reasonable rates, and that there might thus result a discrimination in rates which would be unfavorable to residents of Rhode Island and favorable to the residents of Massachusetts engaged in the same lines of industry, we should be reluctant to accept the contention that, though the corporate capacity of the Narragansett Company to contract with citizens of Rhode Island is plainly limited and subject to legislative control through the Public Utilities Commission, yet in making contracts with corporations or citizens of contiguous or remote states for the supply of electricity generated in Rhode Island it is free from such control." (*Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895, 897; R. 1, 3.)

The Missouri Case.

The case on which the respondent will doubtless principally rely is *Missouri et al. v. Kansas Natural Gas Co.*, 265 U. S. 298 (hereafter the *Missouri* case). The opinion of the Rhode Island Court rests on its interpretation—mistaken, we think, of this case.

In that case the Kansas Natural Gas Company, a foreign corporation (called in the opinion the Supply Company), transported gas from outside of Kansas and sold it at wholesale to public utility companies in that State. This Court held that the Kansas Public Utilities Commission could not regulate the rates at which the gas was thus sold, distinguishing the *Pennsylvania Gas Company* case on the ground that the Pennsylvania Company sold directly to local consumers, while the Kansas Company carried on a business which was practi-

cally all interstate, and only at wholesale. The Court there said:

"The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers." (Page 306.)

"But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. . . . *The paramount interest is not local but national*, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned." (Pages 309, 310. *Italics ours.*)

In our case the business of the Company is chiefly intra-state, not interstate. The paramount interest is local, not national.

The purpose of the attempted regulative action by the receiving State in the *Missouri* case was to keep down the wholesale price of gas brought from outside the State. It was an attempt made by the State where the gas was received. The receiving State had the right to regulate its own local companies, to which the foreign Supply Company sold its gas, for the benefit of the local consumers, but not to regulate a foreign company doing exclusively an interstate wholesale business in that State. The price charged by the foreign company was an element in the cost to the local companies of supplying gas to the consumers, which was beyond the power of the Commission of the receiving State to control, and had to be taken into account, like the price of coal, in reckoning reasonable rates for the local company.

If there were any Federal commission having authority to regulate rates for the service to the Attleboro Company, it

would allow the Narragansett Company to charge remunerative rates. It would do exactly what the Rhode Island Commission has done. But there is no such Federal commission.

That the Kansas Commission, in the *Missouri* case, and the Massachusetts Commission here, should be without authority to regulate the sale at wholesale of gas or electricity brought into the State from without the State, but that nevertheless the Rhode Island Commission should have authority to regulate the sale of electricity generated in Rhode Island and sold in Rhode Island to one Massachusetts Company by a Rhode Island Company whose chief business is Rhode Island business is a perfectly reasonable distinction.

"The line of division between cases where, in the absence of congressional action, the State is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked."

Missouri et al. v. Kansas Natural Gas Co., 265 U. S. 298, 307.

That line can and should be drawn right here. The balance between the considerations calling for local regulation and the considerations which call for freedom of interstate commerce from state interference can and should be struck so as to permit state regulation (in the absence of congressional action) in the present case, even though prohibiting it in cases similar to the *Missouri* case. Other cases may arise, intermediate between the present case and the *Missouri* case, as to which it is unnecessary to express an opinion.

The *Missouri* case does not decide that the Narragansett Company, if it did both retail and wholesale business in Massachusetts, might not be subject to regulation by Massachusetts with respect to all its business, on the ground that, in order to render the regulation of the local business effective, the wholesale business of the same company within Massachusetts must also be regulated. It might well be, if the Narragansett

Company actually entered the State of Massachusetts, and delivered its electricity there to both local consumers and public utility companies, that it would be subject to regulation by Massachusetts with respect to its wholesale business in Massachusetts. But that would be going much farther than is necessary in the present case, where the business of a Rhode Island company, which does not go out of Rhode Island, and enjoys rights, locations and franchises in Rhode Island only, is regulated by the Rhode Island Commission.

On the other hand, if the Narragansett Company generated electricity wholly, or principally, for use out of the State of Rhode Island, the power of the Rhode Island Commission to fix the price at which it should be sold for such use might be doubtful.

There is and can be no claim here that any discrimination is made against the interstate service because it is interstate. In the following cases, where the transmission of gas between states was declared to be free from the burdens which the states attempted to impose, the interstate commerce was of a wholesale character, and there was discrimination against it because it was interstate:

West v. Kansas Natural Gas Co., 221 U. S. 229;

United Fuel Gas Co. v. Hallanan et al., 257 U. S. 277;

Pennsylvania v. West Virginia, 262 U. S. 553, 597-598.

Galloway v. Bell.

A recent case containing *dicta* unfavorable to our contention is *Galloway et al. v. Bell et al.*, 11 F. (2d) 558, decided March 1, 1926, by the Court of Appeals of the District of Columbia. Petition for *certiorari* was denied by this Court on April 26, 1926, 46 Sup. Ct. Rep. 482. (No. 1057, October Term, 1925.)

That case involved the relations of two gas companies both called the Washington Gaslight Company, one incorporated in the District of Columbia and the other in Maryland, the District Company owning all the stock of the Maryland Com-

pany. The District Company delivered gas to the Maryland Company at the State line, and the latter Company sold to consumers in Maryland. Certain Maryland consumers brought a bill in the Supreme Court of the District, alleging that the Public Utilities Commission of the District had fixed a wholesale rate for the sale of gas by the District Company to the Maryland Company; that the District Company was identical with the Maryland Company; that the rate charged to the Maryland customers was higher than that charged to the District customers, and that such higher rates were a discrimination against the Maryland customers. The plaintiffs prayed that the wholesale rate fixed by the Commission for the gas delivered by the District Company to the Maryland Company be declared void; that the District Company be enjoined from charging such rate; that the Commission be enjoined from establishing any rate for such wholesale service to the Maryland Company; and that the Maryland Company be enjoined from increasing its rates.

The Supreme Court of the District dismissed the bill, and the Court of Appeals affirmed the decree on the grounds that the Commission had not attempted to establish any rates for the sale of gas by the District Company to the Maryland Company, and the District of Columbia courts could not attempt to control the rates charged by the Maryland Company in Maryland. It was unnecessary for the Court to say any more. The Court did, however, state that the Commission had no power to fix a rate for the sale at the State line to the Maryland Company, because to do so would be an improper interference with interstate commerce. This *dictum* is made the subject of the headnotes in the report, without regard to the circumstance that the point was not necessary for the decision.

Even if the Commission had fixed a charge for interstate transmission of gas, and such charge had been unconstitutional, the bill would have had to be dismissed. The Maryland customers had no right to relief in the District of Colum-

bia courts against either of the Companies or against the District Commission; and the Court so decides.

That what was said on the point of interstate commerce was a *dictum*, and not an alternative ground of decision, is shown by the fact that the Court did not enjoin the Commission from establishing any rate for the delivery of gas to the Maryland Company. If the Court had not rested its decision squarely and exclusively on the grounds that there was no such order made by the Commission, and that the Maryland customers had no right to relief in the District of Columbia courts, it would have followed its remarks on the Commission's lack of jurisdiction by issuing such an injunction in accordance with the prayer of the bill.

Additional Factors.

Two circumstances in the present case, tending to justify state regulation, which, when added to the outstanding feature that it is not practicable for the State to regulate properly the local service of the Company without regulating also the service here in question, strengthen our argument for state regulation.

First. The Narragansett Company is a Rhode Island corporation, enjoying franchises conferred on it by that State.

Second. The rate here regulated was for the sale within the State of a commodity produced within the State, as distinguished from a rate for transportation.

It is unnecessary to inquire to what extent an interference with interstate commerce by a State would be justified by either of these additional circumstances taken by itself. The coincidence of the three elements favorable to state regulation certainly makes a stronger case for the State than would exist if any of them were absent. The problem being one of practical adjustment between the State and National powers, inevitably involving the balancing of various considerations of policy and convenience, a combination of several considerations may properly bring about a decision which would not be justified unless they were all present.

Because the Narragansett Company enjoys public franchises conferred by the State of Rhode Island, it is peculiarly subject to regulation by the Commission.

The Narragansett Company enjoys no rights, locations or franchises in or from the Commonwealth of Massachusetts. The regulation of the Narragansett Company is by the State which incorporated that Company. The business within Rhode Island has been fostered by special concessions, rights and franchises from that State and its municipalities during a period of forty-two years. During this whole period up to the time when the contract with the Attleboro Company became effective in 1917, the Narragansett Company had confined itself to local public service within the State of Rhode Island.

The basis for the subjection of the rates of a public utility to the test of reasonableness is the protection of that portion of the public who are served by the utility. A public utility company is held to have dedicated its private property to public use. The dedication is primarily for the use of its customers. In consideration of such dedication the Narragansett Company has been granted various rights, locations and franchises. The dedication of private property to public use has occurred only within the State of Rhode Island and the consideration has moved entirely from the State of Rhode Island and its municipalities, but the dedication includes the generating plant, etc., used both for the service within and the service outside of Rhode Island—the service to the 71,553 customers within the State and to the one customer outside. The public welfare demands reasonable regulation by Rhode Island of the one interstate service as well as of the service to the 71,553.

In the *Missouri* case the Supply Company enjoyed no such rights, locations or franchises in the regulating State. On the contrary, it was a foreign corporation doing a wholesale business only in Kansas and Missouri. These facts are stated in the concluding paragraph of the opinion as follows:

"That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Company is not so operating and is not made a party to these franchises by merely doing business with the franchise holders." (265 U. S. 298, 310.)

This language indicates, at least, that if the Company had been enjoying state franchises, that circumstance might have affected the decision. The District Judge, whose decision was affirmed by this Court, thought that the grant by the State of a public franchise to the Company would have been an important circumstance.

"Of course, it is contended that the Company has so far subjected itself, by bringing its product into the state, and by doing so through mains and certain instrumentalities that have been established and built for that purpose, that it has voluntarily submitted itself to the jurisdiction of the state, and that, notwithstanding the fact that this is interstate commerce, it is still subject to state regulation.

"I cannot indulge the contention that by the contract—by the supply contract which was made between the Kansas City Gas Company and the Kansas Natural Gas Company—the Kansas Natural Gas Company necessarily or impliedly became a party to the franchise, and therefore subject to the control of the state."

Missouri v. Kansas Natural Gas Co., 282 Fed. 341, 348.

A public utility company doing a local business, directly with consumers, ordinarily, and almost necessarily, obtains franchises from the State in which it does such business. On the other hand, a company bringing in a commodity from outside and doing no local business, but selling only at wholesale, often operates without any franchises. This Court in the opinion in the *Pennsylvania Gas* case referred to the enjoyment of franchises in the state of New York, in this language:

"The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached *by the use of the streets of the city* in which the pipes are laid . . ." (Italics ours.)

Pennsylvania Gas Co. v. Public Service Commission et al., 252 U. S. 23, 31.

The operation under local franchises was a part of the situation of a company doing a local business, which evidently was in the minds of the Court. The New York Court of Appeals, in the same case, emphasized this consideration.

"The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. . . . The service is due to the state from which the privilege proceeds."

Re Pennsylvania Gas Co., 225 N. Y. 397, 409; P. U. R. 1919 C, 663, 671.

The Narragansett Company not only operates under local franchises, but enjoys its corporate existence only by virtue of its incorporation by Rhode Island. The power which this fact gives to the State to control the corporation does not enable it to interfere with interstate commerce in matters requiring national regulation. See *Colorado v. United States*, 46 Sup. Ct. Rep. 452, 455. But the circumstance that the corporation was chartered by Rhode Island is a weighty consideration in favor of allowing that State to regulate the affairs of the Company in all matters where the desirability of national regulation does not appear.

The above considerations show the desirability of state regulation in a case like the present. The following arguments, on the other hand, show the practicability of enforcing such regu-

lation without causing conflict between the authority of different states, or otherwise directly burdening interstate commerce.

The rate here involved constituted a sale price within the State of a commodity produced within the State, as distinguished from a transportation rate, and therefore was peculiarly subject to regulation by the State.

An unusual feature in this case is that the electrical current is delivered at the State line. The Narragansett Company generates the current at its plant in Rhode Island, transmits it to the State line, and there delivers it. The service is rendered solely in Rhode Island. Moreover, the rate sought to be regulated is the sale price of a commodity—not a transportation rate. The sale price of such a commodity, sold by a local public utility, differs from a transportation rate in interstate commerce in that such price is essentially of local concern, while a transportation rate in interstate commerce is essentially of national concern.

In *Re Pennsylvania Gas Co.*, 225 N. Y. 397; P. U. R. 1919 C, 663, affirmed 252 U. S. 23, the New York Court of Appeals, after reviewing the cases where regulation of interstate commerce by a state has been allowed, said:

"*Dieta may, indeed, be quoted where the court, in sustaining police regulations, has observed, as if by way of contrast, that they did not involve the regulation of rates. . . . But in every case the rates in view were rates of transportation. That is a field where regulation, if there is to be any, must be uniform. A central authority must reconcile the clashing action of localities. What is within the police power of one state is equally in such circumstances within the police power of its neighbor. One cannot freely exercise its will without affecting at the same time the like freedom of another. In the phrase of Hobbes, there is need of 'a common power to keep them in awe'.* (Page 408.)

"We deal here with a different situation. There is here no regulation of transportation. . . . There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. . . . The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial water-ways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local. . . . It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved." (Page 409.)

In *Mill Creek Coal & Coke Co. et als. v. Public Service Commission*, 84 W. Va. 662; 100 S. E. 557; P. U. R. 1920 A, 704, the reasoning of which was subsequently approved by this Court in the *Pennsylvania Gas* case, the Supreme Court of West Virginia at page 673 said:

"The vital distinction should be noted between regulation of rates of transportation and of the rates at which a commodity shall be sold. Transportation across state lines, involving as it frequently does many or all states, is generally a matter of national importance requiring uni-

formity of regulation respecting the rates thereof, and hence is usually beyond the regulatory power of the state. Because of the very nature of the subject matter conflicting state regulations respecting rates ordinarily would result in discord and chaos. There are instances, however, where even in such cases the regulatory power of the state has been sustained. . . .

"In fixing the rates of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was one owed both to citizens of Virginia and to the public in this state. But the two duties do not overlap, as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the community. So long as the rate fixed is not discriminatory or confiscatory, but yields a fair return upon the valuation of the property, it throws no burden upon citizens of other communities or states."

(Page 674.)

The sale price of most commodities, such as are not usually dealt in by public utility companies, is not a matter of governmental concern, either State or Federal. In the case of gas or electricity, sold by a public utility company, the price is subject to governmental regulation. The sale price of such a commodity admits of, and may require, State regulation, but it does not require, nor reasonably admit of, uniform Federal regulation.

Particularly is this true in the case of electricity, the sale price of which depends on the geographical and industrial features of the State concerned. Uniform sale prices for electric energy throughout the country, as the electrical industry is developed today, would be commercially impossible.

"But even within the state, diversity rather than uni-

formity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them."

Re Pennsylvania Gas Co., 225 N. Y. 397, 409; P. U. R. 1919 C, 663, 671.

It may be suggested that in the present case two States are concerned because the electricity is produced in Rhode Island and destined for use in Massachusetts. It is true that this electricity is involved in interstate commerce and that certain sorts of interference by the State of Rhode Island with its transmission would be unlawful. But there is no room for conflict of authority in respect to regulation of rates at which it is thus sold. The State of Massachusetts could not claim to regulate the sale by the Narragansett Company in Rhode Island. The Narragansett Company is not doing business in Massachusetts, any more than if it delivered and sold the electricity to the Attleboro Company at a point in Rhode Island several miles from the State line. The fact that the current is subsequently transmitted into another State is important for some purposes; but it does not make the Narragansett Company do business in Massachusetts. See *Washington Water Power Co. v. Montana Power Co. et al.*, P. U. R. 1916 E, 144 (a decision of the Idaho Public Utilities Commission). As declared in that case (p. 158) the circumstance that the current is metered in the State of ultimate destination is immaterial.

The circumstance that the State of Massachusetts may properly regulate the rates for local distribution by the Attleboro Company involves no conflict of authority between Rhode Island and Massachusetts. The price of the electricity purchased by the Attleboro Company in Rhode Island is merely an element which would have to be taken into account by the Massachusetts Public Utilities Commission, like the price of

coal purchased in Pennsylvania, which might be affected by a Pennsylvania tax on the mining of coal.

If current were transmitted by the Narragansett Company to a point inside the State of Massachusetts and there sold to the Attleboro Company, a very different situation would arise. The electric current would be the subject of interstate commerce in either case; but with regard to the regulation of the sale by the States of Rhode Island and Massachusetts, the situation would be entirely different.

But the sale of the commodity in this case is made in the home State, and here lies a principal distinction between the *Missouri* case and the present one. In the *Missouri* case this Court said that the Kansas Company should have "equality of opportunity" in marketing its product in all States. (265 U. S. 298, 310.) Its rates should not be subject to multifarious regulation by all the different States where it might sell its product. But it does not follow that the producing company may not be subject to regulation by its home State of the prices at which it sells in that state to all customers, whether or not for subsequent use in another State. In the *Missouri* case, when commenting on the *Pennsylvania* case, this Court said that in that case "the things done were local and were after the business in its essentially national aspect had come to an end". (265 U. S. 298, 309.) In the present case, it seems that at the time of the sale of the current to the Attleboro Company the national aspect of the business transaction between the Narragansett Company and the Attleboro Company had not yet begun.

A distinction may be made between cases concerning the distribution of natural gas and those concerning the distribution of electric current, which favors the power of regulation by the states in the latter class of cases. In the case of natural gas the price at which it is sold is almost wholly based on the cost of transportation. See *Landon v. Public Utilities Commission, et al.*, 242 Fed. 658, 689, a case which was reversed in *Public*

Utilities Commission et al. v. Landon, 249 U. S. 236, on a different point. The District Court in that case said:

" . . . whenever a state, acting under the guise of fixing prices at which an article of interstate commerce brought into the state may be sold by the introducer upon its arrival at destination, in reality thereby necessarily fixes or regulates the rate of transportation of such article from its initial point to the point of destination, such action by the state in fixing the sale price is an attempt to directly burden and regulate interstate commerce, and is, therefore, unauthorized." (Page 690.)

This Court subsequently decided in the *Landon* case and the *Pennsylvania Gas* case, that the sale in local distribution of natural gas could be regulated by a State. See also *People's Natural Gas Co. v. Public Service Commission of Pennsylvania et al.*, 46 Sup. Ct. Rep. 371, decided April 12, 1926. The distinction above pointed out by the District Court tends to show that in the case of electric current the grounds for allowing regulation of sale prices by the home State are still stronger. Although this distinction was not mentioned by the Court in the *Missouri* case, it furnishes an additional ground for distinguishing that case from the present one.

In *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, a State regulation of the sale of commodities was held to be an unlawful interference with interstate commerce. The defendant company there operated a grain elevator in North Dakota and purchased grain of neighboring farmers for shipment to markets which were almost entirely outside the State. A North Dakota statute provided, among other regulations of this business, for the fixing by a State official of the prices to be paid by the elevator company to the farmers. In the language of this Court: "This act shows a comprehensive scheme to regulate the buying of grain." (Page 56.) The Court held this regulation an unlawful interference with interstate commerce.

The principal distinction between the *Lemke* case and the

present one is that in the former the business of the public utility company was practically all interstate. But the nature of the business there was so entirely different from the furnishing of electricity, and the regulation so much more extensive, that analogies can scarcely be drawn between the cases. The regulation in the *Lemke* case was of the prices paid by the public utility company, not the prices charged by it. The commodity in question was not produced by a public utility, as is usually the case with electric current and gas. The persons to whom it shipped the grain were out of the State, but the farmers from whom it purchased were all in the State. The regulation of purchase prices was something novel, and entirely different from regulation of prices at which a commodity is sold by a public utility company. It was an extreme case of the exercise of the police power, even as applied to intra-state commerce. The Court did not cite the *Pennsylvania Gas* case.

In *Shafer et al. v. Farmers' Grain Co.*, 268 U. S. 189, a North Dakota statute providing for inspection, grading, etc., similar to what was required by the statute in the *Lemke* case, but without any fixing of prices, was held an unconstitutional interference with interstate commerce. The Court may well have felt in the *Lemke* case that the importance of the local interest in protecting the farmers against the middlemen did not justify a degree of interference with interstate commerce which was justified in the *Pennsylvania Gas* case by the local interest in securing fair charges in the sale of gas by a public utility company.

II.

THE FACT THAT THE OLD RATES WERE EMBODIED IN A CONTRACT DOES NOT PREVENT REGULATION BY THE COMMISSION. IN FACT BOTH COMPANIES UNDERSTOOD THAT THE COMMISSION WOULD EXERCISE AUTHORITY OVER THE CONTRACT.

The contract between the two companies was not protected against the exercise of the police power of the State by the clauses prohibiting the impairment of the obligation of a contract and guaranteeing equal protection of the laws and due process of law.

Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372.

See quotations from this and other cases in our brief before the Commission. (R. 361-364.)

Here the statute establishing the Commission was previous to the contract, although that point is not essential.

There is no doubt that the Rhode Island Legislature intended to give the Commission power to raise rates notwithstanding any contracts that might have been made.

East Providence Water Co. v. Public Utilities Commission et al., 128 Atl. 556 (R. I.).

The Attleboro Company contends that the approval of the contract rate by the Commission in 1917 created an implied contract between the Attleboro Company and the State, which cannot be set aside by the State as against the Attleboro Company without impairing the obligation of this alleged implied contract. (The schedule stating the rate filed by the Company May 16, 1917, appears in the Record, page 275, and the order approving it on page 390.)

This contention leads to a conclusion exactly opposite to the conclusion claimed by the Attleboro Company. It involves the assumption, which is the obvious fact, that the Attleboro Company made its contract with perfect understanding that the contract must be submitted to the Rhode Island Commission,

and would not become effective unless and until the rate was approved by the Rhode Island Commission. In substance, the Attleboro Company intended to and did subject itself to the jurisdiction of the Rhode Island Commission, so far as its right to the rate fixed by the contract is concerned. It did this knowing, in legal contemplation at least, that the approval of a rate by the Commission was not final, whether the rate was or was not a contract rate. It subjected itself first to the possibility that the Commission might not approve the rate originally; second, to the possibility that the Commission might later change the rate.

The Rhode Island Public Utilities Act, Section 33 (Appendix A *post* p. 80) provides that

"The commission may at any time upon notice to the public utility and after opportunity to be heard as provided in section twenty, rescind, alter, or amend any order fixing any rate, toll, charge, joint rate or rates, or any other order made by the commission. . . ."

If the two companies had made this interstate contract for sale of a commodity and never submitted it to the Rhode Island Commission, the Attleboro Company might fairly contest the jurisdiction of the Commission, but when the Narragansett Company, as was intended by both parties, submitted the contract to the Commission for approval of the rate, the Attleboro Company recognized the jurisdiction of the Commission and accepted the contract subject to its authority. It secured all the benefits resulting from the original approval, for the contract would never have gone into operation at all without that approval. It is estopped to contest the jurisdiction of the Commission in its later action with respect to the same contract rate.

But that this submission and approval created any contract with the State of Rhode Island is a conclusion almost too far fetched for argument.

There are certain cases where this Court has held that a contract was made as to rates between a public utility com-

pany and an agency of the State, usually a municipal corporation, which the State was prohibited from changing. See, for instance, *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368. But in that same case the Court said:

"It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question including rates of fare." (Page 382.)

The authority to make such a contract must "unmistakably appear".

Home Telephone and Telegraph Co. v. Los Angeles, 211 U. S. 265, 273;

Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin, 238 U. S. 174, 180;

Public Utilities Commission v. Rhode Island Co., 43 R. I. 135; P. U. R. 1920 F, 687.

In the latter case the Court said at page 145, quoting with approval from *Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin ubi supra*:

"The fixing of rates which may be charged by public service corporations, of the character here involved, is a legislative function of the State, and while the right to make contracts which shall prevent the State during a given period from exercising this important power has been recognized and approved by judicial decisions, it has been uniformly held in this court that the renunciation of a sovereign right of this character must be evidenced by terms so clear and unequivocal as to permit of no doubt as to their proper construction. This proposition has been so frequently declared by decisions of this court as to render unnecessary any reference to the many cases in which the doctrine has been affirmed."

The principle involved was well stated by Mr. Justice Moody in *Home Telephone and Telegraph Co. v. Los Angeles*, 211 U. S. 265, 273:

"The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the State) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature."

See also: *Salt Lake City et al. v. Utah Light & Traction Co.*, 52 Utah 210, 223; P. U. R. 1918 F, 377.

Brooklyn Union Gas Co. v. Prendergast, 7 F. (2d) 628.

Moreover, the intention of the government agency to exercise this authority if it has the power to do so, must unmistakably appear.

Paducah et al. v. Paducah Ry. Co., 261 U. S. 267, 272-275.

See 33 Harvard Law Review, 97-102.

In the present case, the intention of the Legislature to confer such an authority on the Commission, and the intention of the Commission to exercise it, are both so far from appearing unmistakably that their existence is purely a matter of inference. The statute says nothing of such a power in the Commission. The order says nothing as to the continuance of the rate.

Under the language of section 42 (b), of the Rhode Island Act (Gen. Laws, R. I., c. 253, Appendix A, *post*, p. 84), under which section the Commission acted in approving the contract rate, no justification can be found for the creation of any obligation binding upon the State. Section 42 (b) allows a utility, with the approval of the Commission, to grant special rates to any special class or classes of persons, "in cases where the same shall seem to the commission just and reasonable, or required in the interests of the public, and not unjustly discriminatory". In view of the general scope and purpose of

the Utilities Act, as shown especially in sections 38 to 41, inclusive, it is evident that section 42 (b), was intended to permit special rates only so long as they were just and reasonable. If the Commission's approval were taken as preventing any change of the rates during the life of the contract, there would be a likelihood that when conditions had changed the continuing rates would contravene the provisions against discrimination, preference and rebates. The Legislature cannot be deemed to have intended such a result. See *East Providence Water Co. v. Public Utilities Commission et al.*, 128 Atl. 556 (R. I.).

Judge Brown recognized the statutory power of the Commission (R. 2) :

"As the Rhode Island 'Public Utilities Act', Public Laws 1912, Chapter 795, was in force before the making of the contract of May 8, 1917, and as the Narragansett Electric Lighting Company was within the term 'public utility' as defined by that act, the Attleboro Company had full notice that it was dealing with a Rhode Island Corporation of limited power to contract, and subject to continuous regulation in the public interest through an administrative legislative agent, the Public Utilities Commission."

The Supreme Court of Rhode Island in the decision under review recognized the statutory power of the Commission otherwise it would not have passed on the interstate commerce question.

The opinion and uniform practice of the Commission should be allowed much weight on a question of its own powers. The Commission said (R. 402-403) :

"The Commission has always construed such approval as authority for the utility to render service to a consumer of a special class at the rate contained in the schedule approved and under the terms of the contract, until further order of the Commission.

"We do not believe that it is the intent of the law that the approval of the Commission should preclude the Commission from further jurisdiction over such a rate in the public interest.

"If such is the intent of the law, the Commission would feel that such authority should be little, if ever, exercised.

"In this particular case it appeared to the Commission at the time the schedule was submitted for approval that the supply of electric energy by the Narragansett Company to the Attleboro Company under the contract and schedule was to the mutual benefit of both companies, offering to the former a large consumer at an average profitable rate during the terms of the contract, and to the latter a dependable supply of energy at a cost which the latter company must have considered lower than its own cost would be under independent operation. The other consumers could also anticipate a lowered cost of production to the Narragansett Company by reason of the increased load upon the central station.

"The principal reason for the loss to which the Narragansett Company is subjected with reference to this rate schedule and contract is due to the sudden, substantial and permanent increase in its average unit cost of generating plant, due to the increased costs which have followed the change of conditions resulting from the world war."

The reason why the Commission in 1917 did not expressly state that its order approving the schedule submitted would be in force only until further order, was that it assumed that all its orders were understood to be made subject to an implied condition to that effect.

Even supposing, however, that a contract was made between the State, acting through the Commission, and the Narragansett Company, such that if the State had attempted to compel that Company to lower its rates for the service covered by that schedule, it could have successfully objected, the Attleboro

Company would have acquired no rights under that contract. The supposed irrevocable contract would be one between the Narragansett Company and the State, to which the Attleboro Company would not be a party. Certainly the State did not make a contract with the Narragansett Company for the benefit of the Attleboro Company. The Narragansett Company now asks to have the rate changed and the State, through the Commission, consents. The obligation of the contract (if there is any contract) is not impaired when both parties to it consent to its modification.

Almost all cases where the courts have found an irrevocable contract, were cases of contracts between a municipal corporation and a public utility, which the State subsequently attempted to impair by ordering lower rates. *State v. Marshall*, 98 Ohio St. 467, is peculiar, in that the contract between the municipality and the utility was expressly made conditional on the approval of the Commission, and received that approval.

The opinion was rendered *per Curiam* and is ambiguous in its statement that the Commission, on motion of the utility, had no power or authority to open up and set aside its order approving the contract. (Page 468.) The language used is, however, clarified by the opinion in another case, decided on the same day, under the municipal home rule section of the Constitution of Ohio (Section 3 of Article XVIII, as amended September 3, 1912.) *Cleveland Telephone Co. v. Cleveland*, 98 Ohio St. 358. In the latter case at page 385 the Court points out that the municipality involved in *State v. Marshall, supra*, had adopted a home rule charter under the constitution and that

“. . . the contract of settlement between the city and the utilities named, in pursuance of which the order of the utilities commission was entered, was and is a binding and subsisting contract between the parties thereto, and for that reason the utilities commission has no authority to change the rate fixed by that contract during its term.”

During the period covered in the *Marshall* case Ohio had

statutes giving municipal councils power to regulate the price of electricity or gas (General Code, Section 3982) provided the price fixed, when the utility makes written acceptance, shall not be reduced during the period agreed upon, such period not to exceed ten years (General Code, Section 3983) and giving municipal corporations authority to contract to purchase electricity or gas for municipal purposes (General Code, Section 3994). These statutes may or may not have been considerations influencing the decision of the court. The constitutional home rule provision may have been deemed controlling. In any event the case is not persuasive because the customer was a municipality and it does not appear that the particular kind of contract was, or under the State constitution could be made, subject to regulation by the commission. See Page's Annotated Ohio General Code, Section 614-44, and cases cited thereunder and Ohio Constitution, Article XVIII, Section 4, as amended September 3, 1912.

The only case which has been cited, where a Commission fixed a rate to continue for a limited period, and this action by the Commission was held to constitute a contract between the utility and the State, which prevented the State from subsequently changing the rate, is *New York & Queens Gas Co. v. Prendergast*, 1 F. (2d) 351. The Court there held that the rate established by the Commission could not constitutionally be lowered by the express action of the Legislature within one year. Two quotations will show how totally different that case was from this:

"By section 72 of the Public Service Commission Law, the Legislature empowered the commission to fix the rate to be charged by a gas corporation, and also to establish a period, not exceeding three years, during which the rate so fixed shall at all events continue in effect, and thereafter until the commission shall fix a different rate. The Court of Appeals of the state of New York, in *Saratoga Springs v. Saratoga Gas Co.*, 191 N. Y. 123, referring to

this statute, says that it contemplates the fixing of 'a period of repose during which the rate should remain stable'. This view has been generally accepted throughout the history of commission regulation, to the end that for a limited time the rate so fixed may not be disturbed, over the objection, on the one hand, of the company, or, on the other hand, of any party to the proceeding which resulted in the order.

"The Public Service Commission fixed the rate and thermal content, to take effect October 1, 1922, and to continue until the 30th day of September, 1923." (Page 375.)

III.

THE RHODE ISLAND PUBLIC UTILITIES ACT AS APPLIED TO THE ATTLEBORO COMPANY IS NOT UNCONSTITUTIONAL AS DEPRIVING THE ATTLEBORO COMPANY OF THE EQUAL PROTECTION OF THE LAWS.

The suggestion has been made that the Public Utilities Act of Rhode Island is unconstitutional, as depriving the Attleboro Company of the equal protection of the laws, because the Attleboro Company enjoys no corresponding benefits under it. The contention is that the Attleboro Company, being a foreign corporation, has no right to file a complaint with the Commission, and therefore is subjected to the burdens of the statute without deriving any benefit from it.

In discussing this question the following points should be borne in mind:

First: The Attleboro Company is not a public utility for the purposes of this Rhode Island statute. See opinion of the Rhode Island Supreme Court in this case, R. 442, also 129 Atl. 495; P. U. R. 1925 E, 495. It is simply one of the consuming public, that requires a large amount of electric current of a particular description.

Second: The Order complained of (R. 420) establishes a rate for a class of consumers which may include any number of persons, and either foreign or domestic corporations. No claim is made that this rate is too high in comparison with the general schedule of rates applicable to other customers. It is unnecessary to consider whether the Act would authorize an order establishing a rate for a particular person only, or whether such an order would be open to constitutional objections.

Third: The Attleboro Company in fact had notice of the proceedings of the Commission, and fully presented its case. No point can be raised that the Act did not give it an opportunity to be heard.

Tyler v. Judges of Court of Registration, 179 U. S. 405;

Louisville & N. R. R. v. Finn et als., 235 U. S. 601, 609.

Fourth: In constitutional questions of this sort, the Court regards not so much the technical details of a statute as its practical operation.

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 335-336;

New York, New Haven & Hartford R. R. v. New York, 165 U. S. 628, 633;

Chicago, Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453;

See: *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 280-281.

The Public Utilities Act (Gen. Laws of R. I., c. 253, Appendix A, *post*) provides for complaints to the Commission as follows: "Sec. 18. Upon a written complaint made against any public utility by any city or town counsel, or by any corporation, or by any twenty-five qualified electors that any of the rates, tolls, charges, or any joint rate or rates of any public utility are in any respect unreasonable or unjustly discriminatory", the Commission shall proceed to make an investigation.

"Any corporation" in this section includes foreign corporations. Section 2 of the Act provides: "The term 'corporation', when used in this chapter, includes a corporation, company, association, and joint stock company or association." Nothing is said limiting the scope of the Act to domestic corporations. If the Attleboro Company came before the Commission as a public utility it might be a material question whether it was a foreign or domestic corporation, and whether it operated a plant within the State of Rhode Island. But it comes before the Commission only as a consumer. No reason appears why

a foreign corporation should not stand on the same footing, in the character of a consumer, as a domestic corporation.

The Act does not give the right of complaint to every consumer. It gives such a right to municipal bodies, to twenty-five electors acting together, and to any corporation. It is true that it does not give the right of complaint to an individual non-resident, but neither does it give such a right to an individual resident, nor even to every group of twenty-five. Minors are not electors, and until recently women were not. It is assumed that the interests of any community or class will be sufficiently protected by a group of twenty-five electors representing that community or class, or by some municipal body. The case of a non-resident individual customer would be rare, and his interests would be as well looked after by the representative group of responsible customers as if he were a resident. It would be difficult to provide for special representation of non-residents by a group. A corporation, on the other hand, is given a right to complain alone, presumably because its interests are apt to be larger and it in reality represents the interests of a number of shareholders. A foreign corporation would be more likely to be a customer than an individual non-resident. There may be many foreign corporations, having manufacturing plants within the state, which are larger users of power. As much reason exists for allowing a foreign corporation to file a complaint alone as in the case of a domestic corporation.

The Attleboro Company cannot raise the point that the statute might be unconstitutional in its application to some other person, such as an individual non-resident.

Castillo v. McConnico, 168 U. S. 674, 680;

Lee v. New Jersey, 207 U. S. 67;

Hendrick v. Maryland, 235 U. S. 610, 621;

Roberts & Schaefer Co. v. Emmerson, 46 Sup. Ct. Rep. 375.

Whether the term "corporation", when used in a statute, in-

cludes a "foreign corporation" is a question of the interpretation of the whole statute. There have been decisions both ways, according to the nature and purpose of the statute.

Where it is a question of conferring a franchise on a corporation, it may be held that only domestic corporations are included.

Commonwealth v. Boston, 97 Mass. 555.

Where it is a question of the formalities of bringing suit against a corporation, or serving writs on it, the provisions appropriate for a domestic corporation may not be appropriate for a foreign corporation.

Potter v. Lapointe Machine Tool Co., 201 Mass. 557;
Sullivan v. LaCrosse and Minnesota Steam Packet Co., 10 Minn. 386.

On the other hand, in many cases on procedure, foreign corporations are held to be included.

Societe Fonciere v. Milliken, 135 U. S. 304;
Eagle Life Association v. Redden, 121 Ala. 346;
Cross v. Nichols, Shepard & Co., 72 Ia. 239;
Chicago B. & Q. Railroad v. Manning et al., 23 Neb. 552;
Plimpton et al. v. Bigelow, 29 Illn. 362.

Other cases where the word "corporation" was held to include a foreign corporation are:

Lewis et al. v. Bank of Kentucky, 12 Ohio 132;
Southern Life Ins. & Trust Co. v. Packer et al., 17 N. Y. 51.

In the present case, it is not a question of the grant of a special privilege to a corporation, or of the form of legal process appropriate for a non-resident, but of substantial justice to a party affected by the action of the Commission. Although in some circumstances a foreign corporation might not be subject to the jurisdiction of the Commission, in other cases it clearly would be so, as where a foreign corporation carried on a man-

ufacturing business in the State and was a consumer of gas or electricity there. The reasonable course for the Legislature would be to allow a foreign corporation to complain of the action of the Commission, or of a utility company, in the same manner as a domestic corporation. If the Commission acted in any case where it lacked jurisdiction to do so, then the foreign corporation could protect itself in the courts, without any complaint to the Commission. See *Market Street Railway Co. v. Pacific Gas & Electric Co.*, 6 F. (2d) 633, 639.

But even if the Attleboro Company could not have filed an original complaint under Section 18 of the statute, that does not necessarily make the statute unconstitutional as applied to the Attleboro Company. To draw such a conclusion would be to prove too much. It would destroy almost the whole jurisdiction of the Commission.

No single customer, no firm or other group of non-residents, and no group of residents, not comprising twenty-five electors, has a right to file an original complaint. It might easily happen that some group of customers, not able to fulfill that requirement, would be differently situated from any of their neighbors with regard to the service received from a public utility. It may be argued plausibly that every person ought to have a right to complain of discrimination against himself, whether or not any one else cares to complain. It is possible he may be singled out for discrimination.

The answer to these suggestions is that the statute in its practical operation sufficiently protects the interests of all consumers dealing with a public utility company, by the aggregate of its provisions for original complaints and for intervention by parties interested. All ordinary cases of controversies between public utilities are taken care of by investigations initiated by way of original complaint by the customer. The Commission has also power to initiate an investigation of its own motion, and notice thereof is to be given to such interested persons as the Commission shall deem necessary. (See 28, *post* p. 80.) This Court construes statutes providing for

proceedings before a commission or board so as to require notice to all parties interested.

Paulsen v. Portland, 149 U. S. 30;
Wadley Ry. v. Georgia, 235 U. S. 651, 658.

Any person interested may be admitted by the Commission as a party, and thereafter acquires all the rights of an original complainant including the right of appeal.

Public Utilities Commission v. Providence Gas Co.,
42 R. I. 1; P. U. R. 1919 A, 783;
*Public Utilities Commission v. Narragansett Electric
Lighting Co.*, 129 Atl. 495 (R. I.) (the present case
in the Supreme Court of R. I.) R. 442.

The Attleboro Company is one of a class to whom a special rate is made applicable. Assume that it has no right to complain by itself. It is no worse off because it happens to be the only person in that class than it would be if it were a resident and elector in Rhode Island, and the class consisted of twenty-four electors and several non-residents, minors, and other persons not electors. Statutes of this sort are not unconstitutional because they do not expressly take care of all exceptional cases. Such cases are in fact taken care of by the practice of the Commission, as the Attleboro Company has been in fact amply protected by the Commission in this case.

Similar provisions limiting the right to make complaint to public utility commissions to groups varying from ten to one hundred in number are found in the following states:

Connecticut, G. S. § 3635;
Maine, R. S. c. 55, § 43;
See *In re Searsport Water Co.*, 118 Me. 382, 393;
Massachusetts Gen. Laws, c. 159, §§ 14, 24 ("20 legal
voters"); c. 164, § 93;
New Hampshire P. L. c. 238, §§ 5, 6;
New York Public Service Commission Law, § 71;
Wisconsin Statutes 1921, § 1797m—43.

The above statutes will be found in Appendix C at the end of this brief, *post* pp. 96-101.

IV.

**THE COMMISSION HAD JURISDICTION TO MAKE THE ORDER
TO WHICH OBJECTION IS TAKEN.**

This point concerns only the intended scope of the statute, apart from constitutional limitations, which are discussed above. No Federal question is involved in this point.

The Supreme Court of Rhode Island decided that the order of the Commission was "an improper interference by the State with interstate commerce". (R. 442.) In this decision the Rhode Island Court assumed that the Commission was given jurisdiction to make such an order, except as prevented by the commerce clause, and by implication it so decided. It therefore proceeded to base its decision against the Commission upon a Federal ground. The State has acted only through the Commission. If the action of the Commission was an interference by the State, it must have been an action which the State attempted to authorize. If the Commission acted without any authority from the State, there would be no interference by the State. See *Palestine Telephone Co. v. Palestine*, 1 F. (2d) 349. We contend that the interference by the State through the Commission was proper. Our opponents contend it was improper. The issue is entirely on the Federal question.

An examination of the statute confirms the conclusion that the Legislature intended to give as broad jurisdiction as it possibly could. Sections 18 and 21 of the Act (Appendix A, *post*) give the Commission power to regulate "any of the rates . . . of any public utility". Section 2 defines a public utility as "every corporation . . . that now or hereafter may own . . . or control any plant or equipment, or any part of any plant or equipment, within this state . . . for the production, transmission, delivery, or furnishing of gas, electricity, water, light, heat or power, either directly or indirectly to or for the public. . . ."

Section 3 provides that the Commission shall be vested with the powers specified in this Act, "and also with all the powers

necessary to enable said commission to carry out fully and effectually all the purposes of this chapter. . . ."

Section 56 reads:

"The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said commission. The commission shall have, in addition to the powers in this chapter specified, mentioned and indicated all additional, implied and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned and indicated. . . ."

See *East Providence Water Co. v. Public Utilities Commission*, 128 Atl. 556, 558 (R. I.).

The power to regulate service such as is furnished to the Attleboro Company in this case by a public utility doing an extensive local business in Rhode Island, is necessary to enable the Commission to carry out the principal purpose of the Act, *i. e.*, to ensure service at reasonable rates to all consumers. If the Commission cannot establish reasonably compensatory rates for service to large customers like the Attleboro Company, it cannot establish reasonable rates for the service rendered to consumers generally. This point has been discussed above in relation to constitutional questions. Whatever may be its bearing on such questions, it certainly tends to show that the Legislature would at least endeavor to give the Commission power to regulate service furnished to every sort of customer so far as such a power could constitutionally be conferred.

As the Narragansett Company never transports its electricity out of Rhode Island, the sale and delivery of the current (although it is interstate commerce because the current is destined for use out of the State) is a transaction within the State

of Rhode Island, over which the Commission was intended to have jurisdiction. The circumstance that the power of the Commission with regard to such transactions is limited in some respects by the commerce clause, does not show that the Legislature did not intend to extend the regulatory power as far as it could do so without infringing that constitutional provision. The Supreme Court of Rhode Island assumed that such was the intention of the statute.

The fact that the current is involved in interstate commerce does not even tend to show that it was intended to be exempt from interference by the Commission. Certainly the generation and transmission of such current within the State was intended to be subject to regulation as to protective devices and other matters concerning the public safety. Nor is there any reason to suppose that the Rhode Island Commission was not intended to have jurisdiction to regulate the local distribution of gas or electricity brought in from another State. Such regulation, although interfering to some extent with interstate commerce, was held to be constitutional in the *Pennsylvania Gas* case, 252 U. S. 23, and was held to be within the jurisdiction of a Public Service Commission by the New York State Court in that case—225 N. Y. 397; P. U. R. 1919 C, 663, and by other state courts in the *Mill Creek Coal Co.* case, 84 W. Va., 662; P. U. R. 1920 A, 704 and *State ex rel. Corporation Commission et al. v. Cannon Mfg. Co. et al.*, 185 N. Car. 17, 116 S. E. 178; P. U. R. 1923 D, 548. No reason appears why all matters touching on interstate commerce should have been intended to be excluded from the jurisdiction of the Rhode Island Commission, any more than they were excluded from the jurisdiction of other state commissions in the cases referred to.

Two special arguments have been presented in behalf of the Attleboro Company to show that the Legislature did not intend to give the Commission jurisdiction over a case like the present.

First: It is said that the Legislature could not have intended

to give the Commission jurisdiction over interstate transportation on railways because it is common knowledge that Congress has taken over the exclusive regulation of such transportation. And then it is further argued that as the language as to jurisdiction over railways is subject to an implied exception as to interstate commerce, therefore the language as to jurisdiction over other public utilities is subject to a similar exception.

As will be shown below the exception as to interstate railways is express, not implied, but the argument will be considered as stated by counsel for the Attleboro Company.

The first inference is by no means clear. Although the Legislature presumably knew that a state commission could not be given power to interfere with the interstate transportation by railroads by regulation of rates, it also knew that the Commission could regulate many matters connected with the interstate transportation by railroads which have been decided not to be a direct burden on such commerce and with regard to which no Federal legislation is applicable. See *Missouri Pac. Ry. v. Larabee Flour Mills Co.*, 211 U. S. 612. Presumably it intended that the Commission should regulate even interstate transportation by railroads as far as it could do so.

The further inference, however, as to interstate commerce of other public utilities is still weaker. Even if the intent were to exclude interstate commerce of railroads entirely from the jurisdiction of the Commission, it does not follow that interstate commerce by other public utility companies was to be entirely excluded from that jurisdiction. The legal situation of other public utilities with regard to interstate commerce is not the same as that of railroads. Congress has regulated the interstate business of the railroads, but it has not legislated about the transmission or sale of electricity, and the Legislature may be presumed to have had in mind the long-established principle of constitutional law that the power of the States to regulate interstate commerce depends in many in-

stances on the fact that Congress has not spoken on the subject.

Moreover, the language of the statute with regard to electric companies is not the same as that with regard to common carriers. By Section 2, the term, common carrier, applies to all railroad companies, etc., "operating any agency for public use in the conveyance of persons or property within this state. . . ." Other public utilities are defined as companies operating "any plant or equipment, or any part of any plant or equipment, within this state" for the transmission, delivery or furnishing of electricity, etc. Conveyance by a common carrier, to be subject to the Act, by its express terms must be entirely within the state. But although an electric company, to be subject to the Act, must have some plant in the State, it is not said that the furnishing of electricity, in order to be subject to the Act, must be within the State. This omission, when dealing with electric companies, of language limiting the application of the Act to companies operating solely within the State, is significant.

It is not to be presumed that the Legislature intended to exclude from the jurisdiction of the Commission cases where the Commission could be given power to act. On the contrary, the presumption is that the Commission was intended to extend its jurisdiction as far as it could constitutionally do, in all cases where the exercise of its jurisdiction was necessary to carry out fully the purposes of the Act. As above pointed out, the Legislature certainly could not have intended to leave the Commission without power to require the use of safety devices in the transmission of electricity for interstate use. Nor is it probable that the Commission was not intended to have power to regulate the distribution and sale to local consumers of current brought in from outside the State, as has been done in New York, West Virginia, North Carolina, and doubtless in other States.

Second: It is said that the Commission was not intended to

have jurisdiction over this foreign company, because the statute gives no right to such a company to file a complaint.

It has been argued above (under III) that the Attleboro Company could file a complaint. But even if the Attleboro Company could not have filed an original complaint, that would not show that the Commission was not intended to have jurisdiction. To draw such a conclusion would be to prove too much. As pointed out above, it would prove that the Commission was not intended to have jurisdiction of controversies between a public utility and any non-resident or any one or more of its resident customers (not being twenty-five electors). In all investigations, however initiated, notice is to be given to all interested parties, and when any party intervenes, it acquires the rights of a complainant. *Public Utilities Commission v. Providence Gas Co.*, 42 R. I. 1; P. U. R. 1919 A, 783.

If the method of procedure provided in the statute does not deny the Attleboro Company the equal protection of the laws or deprive it of its property without due process of law (as to which see argument under III above), there is surely no such extraordinary or unreasonable feature about it as would raise a presumption that the Legislature did not intend to subject the rates charged to the Attleboro Company in the present case to the regulatory power of the Commission.

V.

THE COMMISSION HAD POWER TO FIX FOR SERVICE TO THE ATTLEBORO COMPANY A RATE YIELDING A REASONABLE PROFIT ON THAT SERVICE, AND ANY LESS RATE WOULD BE AN UNLAWFUL DISCRIMINATION.

The Attleboro Company contends that, even if the power of the Commission be admitted, yet the order of the Commission deprives the Company of its property without due process of law, because the facts did not warrant the setting aside of the contract rate and the imposition of the new rate. Without abandoning the right to go into the question whether the evidence supports the findings, the Attleboro Company claims that the Commission followed erroneous principles of law in dealing with those findings.

These findings are as follows:

“The Commission is satisfied that the method used and principles applied in the determination of costs as set forth in Exhibit 10 [filed by the Narragansett Company] are correct; that upon the evidence before the Commission, it appears that the loss to the Narragansett Company resulting from the supply of electric energy to the Attleboro Company under Schedule No. 68 [the contract rate], including a return of eight per cent. upon that part of its investment used in rendering such service, has been for the years 1918 to 1923 inclusive as follows:” (Amounts varying between \$41,000 and \$61,000 a year.) (R. 399.)

“The Commission further finds upon the evidence, that the aggregate loss to the Narragansett Company from serving the Attleboro Company for the term of the contract under the contract rate and Schedule 68, after a return of 8% on the investment devoted to such Attleboro Company service will be not less than \$1,500,000.00.

“The evidence further shows and the Commission finds that the method used and the principles applied in the determination of allocation of plant to the Attleboro service, the receipts from such service, the operating costs thereof,

and the net financial results from the service rendered the Attleboro Company, are correct, . . . and that the result of such operation for the year 1923, shows that the Narragansett Company suffered an operating loss of not less than \$4,326.03, without any return whatever upon the investment devoted to such service. It also appears that the probable operating loss during the year 1924 to the Narragansett Company is not less than \$6,881.95, before any return upon investment.

"The evidence further shows that the estimated annual net losses to the Narragansett Company for service under Schedule No. 68 after an 8% return on capital, for the remaining years of the contract, are as follows:" (Amounts increasing from \$50,000 to \$146,000 a year.) (R. 400, 401.)

"The evidence shows that there is no present reason to anticipate any reduction in such unit costs. (R. 404.)

"After a careful consideration of all the evidence the Commission is of the opinion and therefore finds that the rates contained in schedule . . . No. 68 are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the provisions of the Public Utilities Act in that the said rates, tolls and charges yield no return on the value of the property used by the Narragansett Company in rendering service to the Attleboro Company, while the rates, tolls and charges charged by the Narragansett Company to its other customers yield a fair return on the value of the property used for such service.

"The Commission further finds that a continuance of service to the Attleboro Company under said schedule No. 68 will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers." (R. 404.)

"The Commission find that under present conditions a return of approximately 8% on the value of the invest-

ment devoted to the furnishing of service to the Attleboro Company is a reasonable return, and that considering all the evidence submitted, service by the Narragansett Company under Schedule . . . No. 125 [containing the new rate] will yield to the Narragansett Company approximately 8% on the investment devoted by the Narragansett Company to the furnishing of such service.

"For all of the reasons hereinbefore stated the Commission finds that the rates contained in Schedule . . . No. 125, are just, reasonable, sufficient and not unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act for the reason that such rates, tolls and charges yield a fair return and no more than a fair return on the value of the property used for such service, and that said rates should be substituted for the rates contained in Schedule . . . No. 68." (R. 419.)

The findings that the contract rates are unjust, unreasonable and discriminatory, and that their continuance will be detrimental to the public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers, and that the new rates are reasonable and not discriminatory, are findings of fact by an administrative board, and are entitled to all the weight due to them as such.

Illinois Central R. R. Co. et als. v. Interstate Commerce Commission, 206 U. S. 441;

Darnell v. Edwards et al., 244 U. S. 564, 569;
Reno Power, Light & Water Co. v. Public Service Commission, 300 Fed. 645, and cases cited at p. 653;

Pacific Coast Elevator Co. v. Department of Public Works, 130 Wash. 620; 228 Pac. 1022.

The Attleboro Company apparently seeks to treat these findings as conclusions of law made upon erroneous theories. The view suggested seems to be that the Commission in determin-

ing what was reasonable, and what was detrimental to the public welfare, did not give proper weight to the fact that the Attleboro Company had a contract for a certain rate. The Commission, it is said, should not have displaced the contract rate, even though they might have found the rate unreasonable if there had been no contract, and if they did displace it, they should not have raised it to the figure which they would have adopted if there had been no contract.

While the Narragansett Company wishes to receive the full benefit of all the findings of fact in its favor, it maintains that all the findings were not only justified but required by the evidence, and that if the Commission had proceeded on the principles suggested, and had given to the Attleboro Company a rate less than it would have paid if it had had no contract, the Commission would have discriminated unlawfully in favor of the Attleboro Company.

The rates for each class of business done by a public utility should be reasonably compensatory for the service rendered, without regard to the return obtained from other classes of business.

This kind of question has generally been raised in cases where Public Service Commissions have fixed rates for a particular class of service, which were alleged to be not compensatory. This Court in recent cases has given relief from such rates, upon the principle above stated, although the Company has been earning dividends on its business as a whole.

Interstate Commerce Commission v. Union Pac. R. R.,
222 U. S. 541, 549;

Northern Pac. Ry. Co. v. North Dakota, 236 U. S.
585, 595-597;

Vandalia R. R. Co. v. Schnull et al., 255 U. S. 113.

See also *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 25-26;
Norfolk & Western Ry. Co. v. Conley, 236 U. S. 605.

In that class of cases the argument for the validity of the

rate established by the Commission was stronger than the present argument advanced against the authority of the Commission to raise the contract rate. The act of the State Commission might conceivably be upheld as long as the Company was not prevented from getting a fair return on its entire business. The State would have power to decide which classes of business should be treated separately, and which not. Such a view seems to have been at one time held by the Supreme Court of the United States. See *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19. But the Court in the *Northern Pacific* case, above cited, repudiated any such doctrine, and denied that the *Wilcox* case, or any earlier cases, were to be considered as authority therefor.

In the present case, the order of the Commission, finding the contract rate not reasonably compensatory, is attacked. It is a question of the right of the State to provide that a particular class of service should be paid for at rates reasonably compensatory for that service. The presumptions in favor of the reasonableness and constitutionality of the State action are in our favor.

In *Public Utilities Commission v. Wichita R. & L. Co.*, 268 Fed. 37, 41, 42, the Circuit Court of Appeals, in a case somewhat similar to the present, where an old contract rate was superseded, declared the principle above stated, that the rates of each particular class of service must be reasonably compensatory for the service rendered.

Upon appeal to this Court, the decision was reversed (260 U. S. 48) on the grounds that the appellant had not had opportunity to make a contest on the facts, and that there was no proper finding of the facts. There is nothing to show that the decree of the Circuit Court of Appeals would not have been affirmed if there had been a proper finding of the facts. See a discussion of this case in our brief before the Commission. (R. 369-372.)

The case of *Wichita R. R. & L. Co. v. Court of Industrial Relations*, 113 Kan. 217; P. U. R. 1923 D, 593, is not in point. In

that case the Court held that the return from a certain contract was compensatory, notwithstanding that the Commission had held it to be non-compensatory. But the ground of the decision was that the cost had decreased since the finding of the Commission, and appeared at the trial in court to be so low that the contract was amply compensatory. (Page 230.) The case contains some language that does not seem very consistent with the doctrine of this Court in *Interstate Commerce Commission v. Union Pacific R. R., supra*, but it must be borne in mind that the question before the Court was whether the Commission was bound to override the contract, because the contract rate on that particular service was not fully remunerative, and not whether the Commission had the right to override the contract for such a reason if it thought proper to do so.

The case of *Arkansas Natural Gas Co. v. Arkansas R. R. Commission et al.*, 261 U. S. 379, is also not in point because there the statute provided that the Commission should have no jurisdiction to change existing contracts. These two cases are discussed in our brief before the Commission. (R. 377-379.)

The decision of Judge Brown in *Attleboro Co. v. Narragansett Co.*, 295 Fed. 895 (see R. 14), enjoining the carrying out of a former order of the Commission in this controversy, has no bearing on this point. It rests on the ground that there was no formal hearing and no proper finding of facts. On the necessity of a proper hearing and finding of facts, see *Rivelli et al. v. Providence Gas Co.*, 44 R. I. 76; 115 Atl. 461. In the *Attleboro* case just cited the Court's comments on the evidence appearing in the record before it are only *dicta*. And even as *dicta* they have no application to the evidence appearing in the present record, most of which was presented to the Commission for the first time at the hearing after which the present order was made. Judge Brown said (p. 901, R. 14) :

"The finding that the contract was unprofitable and therefore discriminatory rested upon ex parte statement, and moreover is a non sequitur.

"That the initial return was low and that profit was expected during later years was stated in the defendant's application to the commission for approval of the contract rates. There was no finding that a present loss would result in rendering the contract as a whole unprofitable. . . .

"Before a contract can be interfered with under the police power, it must appear that the contract does in some manner affect adversely the welfare of the public.

"There is nothing in the records to show that the defendant brought to the notice of the commission any evidence that the company would be unable to perform its full duty to the community whose interest it is the function of the committee to protect." (Page 901.)

"Even if the commission had received an *ex parte* statement that a single contract was for the time being unprofitable, this was far from establishing the fact that the public interest had been injuriously affected." (Page 902.)

On the present record instead of the Commission's having only an *ex parte* statement that the contract is for the time being unprofitable, the uncontradicted evidence presented at a full hearing was that the contract rate fails by a wide margin to give the Narragansett Company any substantial return, both at the present time and for the entire term of the contract, and fails to pay the actual cost of service exclusive of any return on the investment used in furnishing such service, and that the loss, instead of becoming less, will increase in future years. There are now express findings that the old rates were unreasonable, and detrimental to the public welfare.

The rates charged to the Attleboro Company should give to the Narragansett Company a reasonable profit on the portion of investment devoted to that service. The Commission has proceeded upon this theory, which it was certainly at liberty to adopt, if it was not bound to do so. To effect this the contract must be disregarded in determining what is a reasonable rate.

It is true that the contract rate cannot be disturbed unless it is unreasonable, but if it is less than the rate which would be fixed for that service in the absence of the contract, it may be found to be unreasonable. The Commission may properly allow the public utility to earn a reasonable profit on service which is the subject of a contract as much as on service which is not affected by any contract.

Public Utilities Commission v. Wichita R. & L. Co.,
268 Fed. 37;

Market Street Ry. Co. v. Pac. Gas & Electric Co., 6
F. (2d) 633, 637;

Salt Lake City et al. v. Utah Light & Traction Co., 52
Utah 210, 223; P. U. R. 1918 F, 377; and see note,
p. 396;

Re Utah Power & Light Co., P. U. R. 1921 B, 827;
1921 C, 294, 326 (before the Utah Public Utilities
Commission).

Any other method of procedure would produce an unjust discrimination in favor of the consumer having the contract, both as regards any other customer who may at any time take the same service, and as regards the customers in general who are paying rates that yield the Company a reasonable profit.

It is true also that a rate duly established by the State cannot be set aside as too low simply because it yields a less profit than the State might reasonably allow. But it does not follow from this that when the State has allowed a rate as reasonable, which may perhaps be somewhat higher than it might have fixed, it cannot make that rate apply to contract holders. There is a certain range of reasonableness within which the State can act. If it establishes a certain rate that is reasonable apart from the existence of any contract, it can make that rate apply to contract holders.

The findings and the evidence here go further than is necessary to support the order of the Commission superseding the contract rates. Not only does the Narragansett Company fail

to receive a reasonable compensation for its service, but there is an actual continuing loss on this service, without taking into account any return on the investment, a condition which on any theory renders the rate unreasonable.

It is suggested that, as the true reason for holding a rate to be unreasonably low is that it impairs the utility's power to render proper service to its other customers at reasonable rates, therefore it is not justifiable for a court or commission to set aside the contract rate unless it appears that the advantage gained by the particular contract customer in having a low rate prevents the Company from giving proper service to its other customers and paying reasonable dividends to its stockholders. But this argument is only specious. Every advantage gained by a contract customer, over the rate he would have to pay if he had no contract, is a discrimination in his favor against other customers. It tends to impair the ability of the Company to serve its other customers. How much it actually impairs that ability is immaterial. Any other doctrine would make the right of the customer to retain the benefit of his contract depend on how large a consumer he was. A very small customer of a big company could hang on to his contract forever, no matter how outrageous a preference it gave him.

There may be many customers having contracts, no one of which would cause a large loss to the Company, and yet taken together they might amount to a serious burden. Suppose a public utility company has numerous contracts with particular customers, varying in their terms, and relating to several different classes of service, or to different localities in which the cost of service varies. The Company may have a good case for raising its rates as to one such class of service; but as to the other classes of service it may be in doubt, not having yet compiled sufficient *data* to prove its case for a raise. The contracts relating to the first class of service may involve, individually and in the aggregate, only small amounts; the aggregate of the contracts in all classes of service may involve very large

amounts. Cannot the Commission approve the increased rates in the first class of service, and make them applicable to the contract holders, without making the investigation cover rates in all classes of service, and bringing in all contract customers, so as to determine whether the aggregate of all the contracts amounts to a serious burden on the Company?

In no case will there be found any reference to the amount of burden which a contract casts on the utility company, or to the relative importance of a particular customer, or of all the contract customers taken together, as compared with the whole of the public served.

Supposing that a contract is properly set aside as imposing too low a rate, none of the cases indicate that the Commission or the Court in fixing a higher rate proceeds on any different principles than if there had never been any contract. On the contrary, in cases where contract customers claim exemption from a rate fixed by the Commission, the practice of the courts, as well as utility Commissions, is to treat the fact that the rate fixed by the Commission is higher than the contract rate as showing that the latter is unreasonable and discriminatory, and to make the contract customers (whenever the commission has power to affect their contracts at all) subject to the same rate as other customers.

United States Smelting, Refining & M. Co. v. Utah Power & Light Co. et al., 58 Utah 168; 258 U. S. 609;

Market St. Ry. Co. v. Pacific Gas & Electric Co. et al., 6 F. (2d) 633, 636;

In re Searsport Water Company, 118 Maine 382; *Leiper v. The Baltimore & Philadelphia R. R. Co. et al.*, 262 Pa. 328, P. U. R. 1919 C, 397;

State ex rel. Washington University v. Public Service Commission, 272 S. W. 971, 972; P. U. R. 1926 A, 764, 767 (Missouri Supreme Court);

Re Utah Power & Light Company, P. U. R. 1921 B,

827; 1921 C, 294, 326 (Utah Public Utilities Commission);

Re Orleans Electric Light & Power Co., P. U. R. 1919 D, 979, (Indiana Public Service Commission).

Although the machinery provided by the Interstate Commerce Act for establishing rates in interstate commerce differs from that provided by the Rhode Island Public Utilities Act for establishing rates for service subject to its jurisdiction, the establishing of a rate for a particular class of service by the Rhode Island Commission has in substance the same effect on an existing contract that the establishment of a rate in interstate commerce has upon contracts with regard to such commerce. The rate applies to the contract holders just as if they had not contracts. *Armour Packing Co. v. United States*, 209 U. S. 56, 80-83. Compare sections 39 and 40 of the Rhode Island Act, forbidding discrimination.

VI.

THE ORDER OF THE COMMISSION IS SUPPORTED BY THE EVIDENCE.

The evidence is fully reported in the record. The opinion of the Commission analyzes it carefully, and shows the manner in which the Commission's conclusions are reached. The arguments before the Commission of counsel on both sides (incorporated in the Record, pp. 188-222) discuss the facts at length.

It is undoubtedly the right of this Court to give its independent consideration to the facts as well as the law in the case, so far as is necessary to decide the constitutional points involved.

On the other hand, it is the province of the Public Utilities Commission of the State, as an administrative board, to determine such questions.

"The question of the reasonableness of what it [the Narragansett Company] has attempted to do, and whether the public interest is such as to override the obligation of its contract, involves an administrative question which cannot be determined by the defendant or by this Court.

"The statutory commission was created by the Legislature to determine such questions. . . ." *Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co.*, 295 Fed. 895, 904. (R. 20.)

There is a presumption that such findings are true, unless there is no evidence on which they could properly have been founded.

Interstate Commerce Comm. v. Union Pac. R. R., 222 U. S. 541, 547;

Atchison T. & S. F. Ry. Co. v. United States, 232 U. S. 199, 221;

Darnell v. Edwards et al., 244 U. S. 564, 569;

Salt Lake City et al. v. Utah L. & T. Co., 52 Utah 210; P. U. R. 1918 F, 377, 392-393.

In cases where the issue is whether rates are so low as to be

confiscatory of the public utility's property, the Federal courts go into the evidence fully. But this is not such a case.

Smyth v. Ames, 169 U. S. 466, 522-550;
Willecox et al. v. Consolidated Gas Co., 212 U. S. 19;
Des Moines Gas Co. v. Des Moines, 238 U. S. 153;
Pacific Gas & Electric Co. v. San Francisco, 265 U. S.
403;

See *Van Dyke et al. v. Geary et al.*, 244 U. S. 39, 48-49;
Ohio Valley Water Co. v. Ben Avon Borough et al.,
253 U. S. 287.

It is further submitted that in the present case, even without such presumption, the evidence not only supports but requires such findings.

Respectfully submitted,

CHARLES P. SISSON,
Attorney General of the State of Rhode Island,
for PUBLIC UTILITIES COMMISSION OF
STATE OF RHODE ISLAND.

ROLAND W. BOYDEN,

ARTHUR M. ALLEN,

ROLAND GRAY,

FRANK D. COMERFORD,

*Counsel for NARRAGANSETT ELECTRIC
LIGHTING COMPANY.*

APPENDIX A.

EXTRACTS FROM GENERAL LAWS OF RHODE ISLAND, 1923, CHAPTER 253 (PUB. LAWS 1912, CH. 795).

Of the Public Utilities Commission and of the Regulation and Control of Public Utilities.

(3664)

Section 1. This chapter shall be known as the Public Utilities Act, and shall apply to the public utilities herein described and to the commission hereby created, and to the public utility corporations and persons herein mentioned and referred to.

(3665)

Sec. 2. The term "commission," when used in this chapter, means the public utility commission hereby created.

The term "commissioner," when used in this chapter, means one of the members of such commission.

The term "corporation," when used in this chapter, includes a corporation, company, association and joint stock company or association.

The term "person," when used in this chapter, includes an individual, corporation, and a firm or co-partnership.

The term "public utility," when used in this chapter, shall mean and embrace, and apply to every corporation, company, person, association of persons, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any railroad, or street railway within this state, or that now or hereafter may operate or do business as a common carrier within this state; and to every corporation, company, person, association of persons, their lessees, trustees or receivers, appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any plant or equipment, or any part of any plant or equipment, within this state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery, or furnishing of gas, electricity, water, light,

heat or power, either directly or indirectly to or for the public: *Provided*, that this chapter shall not be construed to apply to any public water works and water service owned and furnished by any city or town.

The term "common carrier," when used in this chapter shall mean and apply to and embrace all railroad corporations, street railway corporations, express companies, freight companies, freight line companies, dining-car companies, steam-boat, power-boat and ferry companies, and all persons and associations of persons whether incorporated or not, and their lessees, trustees and receivers, appointed by any court whatsoever, operating any agency for public use in the conveyance of persons or property within this state by land or by water, or both.

The term "railroad," when used in this chapter includes every railroad other than a street railway, by whatsoever power operated for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations, wharves and terminal facilities of every kind, used, operated, controlled, leased or owned by or in connection with any such railroad.

The term "street railway," when used in this chapter includes every railway by whatsoever power operated or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city or town, and including all switches, spurs, tracks, rights of trackage, subways, tunnels, stations, terminals, and terminal facilities of every kind, used, operated, controlled or owned, by or in connection with, any such street railway.

The terms "plant or equipment," when used in this chapter, shall mean and apply to and embrace all the real estate, easements, buildings, machinery, apparatus, devices, rolling stock, and tangible property of whatsoever kind and nature, and

wherever located, used, controlled, operated, leased or owned by a public utility in the conduct of the business thereof.

The term "service" is used in this chapter in its broadest and most inclusive sense.

(3666)

Sec. 3. There shall be a public utilities commission for the state, which commission shall be vested with and possessed of the powers and duties specified in this chapter, and also with all the powers necessary to enable said commission to carry out fully and effectually all the purposes of this chapter. . . .

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(3680)

Sec. 17. All hearings, investigations and inquiries before the commission shall be governed by rules to be adopted and prescribed by the commission, and in such hearings and investigations and inquiries, the commission shall not be bound by the technical rules of evidence.

(3681)

Sec. 18. Upon a written complaint made against any public utility by any city or town council, or by any corporation, or by any twenty-five qualified electors that any of the rates, tolls, charges or any joint rate or rates of any public utility are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever of any public utility, affecting or relating to the conveyance of persons or property or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telephone or telegraph message, or any service in connection therewith, is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained or is unsafe, or the public safety is endangered thereby, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, regulations, measure-

ments, practice, act or service complained of shall be entered by the commission without a formal public hearing. When any complaint shall be made by twenty-five or more qualified electors, such complaint shall designate one of the complainants upon whom shall be served all notices, orders and citations required by this chapter to be served upon complainants.

(3682)

Sec. 19. The commission shall, prior to such formal hearing notify the public utility complained of that a complaint has been made, and ten days after such notice has been given, the commission may proceed to set a time and place for a hearing and an investigation as hereinafter provided.

(3683)

Sec. 20. The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place where and when such hearing and investigation will be held and such matters considered and determined. Both the public utility and the complainant shall be entitled to be heard and appear by counsel, and shall have process to enforce the attendance of witnesses.

(3684)

Sec. 21. If upon such a hearing and investigation had under the provisions of this chapter, the commission shall find any existing rates, tolls, charges, or joint rate or rates of any public utility, to be unjust, unreasonable, insufficient or unjustly discriminatory or to be preferential or otherwise in violation of any of the provisions of this chapter, the commission shall have power to fix and order substituted therefor such rates, tolls, charges or joint rates as shall be just and reasonable.

• • • • •

(3687)

Sec. 24. If upon such a hearing and investigation it shall be found that any rate, toll, charge, or joint rate or rates is unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of this chapter, or that any regulation, measurement, practice,

act or service complained of is unjust, unreasonable, insufficient, preferential or otherwise in violation of any of the provisions of this chapter, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the public utility found to be at fault shall pay the expenses incurred by the commission upon such investigation either in whole or in part as the commission in its discretion may determine.

(3688)

Sec. 25. The commission may, in its discretion, when complaint is made of more than one rate or charge, order separate hearings thereon, and may consider and determine the several matters complained of separately and at such time as it may prescribe. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3689)

Sec. 26. Whenever the commission shall believe that any of the rates, tolls, charges, or any joint rate or rates, charged, demanded, exacted or collected by any public utility are in any respect unreasonable, or unjustly discriminatory, or otherwise in violation of this chapter, or that any regulation, measurement, practice or act whatsoever of such public utility, affecting or relating to the conveyance of persons or property, or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power, or any service in connection therewith, or the conveyance of telephone or telegraph messages, or any service in connection therewith, is in any respect unreasonable, insufficient, or unjustly discriminatory; or that any service of such public utility is inadequate or cannot be obtained, or is unsafe, or the public safety is endangered thereby, or that an investigation of any matter relating to a public utility should, for any reason be made, it may on its own motion, summarily investigate the same with or without notice.

(3690)

Sec. 27. If, after making such summary investigation, the

commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested, a statement notifying the public utility of the matters under investigation. Ten days after such notice have been given the commission may proceed to set a time and place for a hearing and investigation.

(3691)

Sec. 28. Notice of the time and place for such hearing and investigation shall be given to the public utility and to such other interested persons as the commission shall deem necessary, as provided in section twenty hereof, and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such hearing and investigation had been made on complaint.

(3692)

Sec. 29. The commission shall cause a certified copy of all its orders to be served upon an officer or agent of the public utility affected thereby, and upon the complainant if any there be, and all such orders shall of their own force take effect and become operative ten days after service thereof unless a different time be fixed by the order.

(3696)

Sec. 33. The commission may at any time upon notice to the public utility and after opportunity to be heard as provided in section twenty, rescind, alter, or amend any order fixing any rate, toll, charge, joint rate or rates, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

(3697)

Sec. 34. Any public utility or any complainant, aggrieved by any order of the commission fixing any rate, toll, charge, joint

rate or rates, or any order fixing any regulation, measurement, practice, act or service, may appeal to the supreme court for a reversal of such order on the ground that the rate, toll, charge, joint rate or rates, fixed in the order are unlawful or unreasonable, or that any such regulation, measurement, practice, act or service fixed in such order is unlawful or unreasonable.

The party prosecuting the appeal shall file a petition with the clerk of the supreme court within seven days from the service of the order appealed from, and such petition shall set forth the grounds upon which it is claimed that the order appealed from is unlawful or unreasonable. Thereupon the clerk of the supreme court shall issue citation to all parties in interest, including the commission, returnable at any time within thirty days from date of its issue in the discretion of the court, and the court shall hear and determine, as soon as may be, the matter, and either sustain or reverse the order appealed from. The court is hereby given authority to regulate the practice and procedure in such appeal by such rules as it may see fit to make: *Provided*, that all such appeals shall have precedence over other civil cases in the supreme court.

(3699)

Sec. 36. At any hearing in the course of such an appeal a transcript of the testimony before the commission in such case, duly certified by the stenographer taking the same, and allowed by one of the commissioners, shall be admitted as testimony.

(3700)

Sec. 37. If, upon the hearing of the appeal, newly discovered evidence shall be introduced by the appellant which is found by the court to be of such a character and of sufficient importance, to warrant a reconsideration of the order appealed from, the court, before proceeding to render a final decision, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceeding in said action for sixty days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may alter, amend

or rescind the order appealed from, and shall report its action thereon to the court within fifty days from the receipt of such evidence. If the commission shall rescind the order appealed from, the appeal shall be dismissed. If it shall alter, or amend the same, such altered or amended order shall take the place of the original order appealed from and the court shall render its decree thereon as though made by the commission in the first instance. If the original order shall not be altered, amended or rescinded by the commission, the final decision shall be rendered upon such original order and the final decree entered in conformity therewith.

(3701)

Sec. 38. Every public utility is required to furnish safe, reasonable and adequate services and facilities. The rate, toll or charge, or any joint rate, made, exacted, demanded or collected by any public utility for the conveyance or transportation of any persons or property between points within the state, or for any heat, light, water or power produced, transmitted, delivered or furnished, or for any telephone or telegraph message conveyed, or for any service rendered or to be rendered in connection therewith, shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful.

(3702)

Sec. 39. If any public utility or any agent or officer of a public utility, as defined in this chapter, shall directly or indirectly by any device whatsoever, or otherwise charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in, or affecting, or relating to, the transportation of persons or property between points within this state, or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveyance of telegraph or telephone messages, or for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force or established as provided herein or than it charges demands,

collects, or receives from any other person, firm or corporation for a like and contemporaneous service, under substantially similar circumstances and conditions, such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars for each offense.

(3703)

Sec. 40. If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense.

(3704)

Sec. 41. It shall be unlawful for any person, firm, or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting, or relating to, the transportation of persons or property, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power, or the conveyance of telephone or telegraph messages within this state, or for any service in connection therewith, whereby such service shall by any device whatsoever or otherwise be rendered free, or at a less rate than that named in the published schedules and tariffs in force as provided herein, or whereby any service or advantage is received other than is herein specified. Any person, firm, or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a

fine of not less than fifty dollars nor more than five hundred dollars for each offense.

(3705)

Sec. 42. The provisions of sections thirty-nine, forty and forty-one of this chapter shall be subject to the following exceptions:

(a) A public utility may issue or give free transportation or service to its employees and their families, its officers, agents, surgeons, physicians and attorneys-at-law, and to the officers, agents and employees, and their families of any other public utility.

(b) With the approval of the commission any public utility may give free transportation or service, upon such conditions as such public utility may impose, or grant special rates therefor to the state, to any town or city, or to any water or fire district, and to the officers thereof, for public purposes, and also to any special class or classes of persons, not otherwise referred to in this section, in cases where the same shall seem to the commission just and reasonable, or required in the interests of the public, and not unjustly discriminatory.

(c) With the approval of the commission any public utility operating a railroad or street railway may furnish to the publishers of newspapers and magazines, and to their employees, passenger transportation in return for advertising in such newspapers or magazines at full rates.

(d) With the approval of the commission any public utility may exchange its service for the service of any other public utility furnishing a different class of service.

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(3707)

Sec. 44. The commission shall have power, when deemed by it necessary to prevent injury to the business or interest of the people or any public utility of this state in case of any emergency to be judged of by the commission, to permit any public utility to temporarily alter, amend or suspend any ex-

isting rates, schedules and order relating to or affecting any public utility or part of any public utility in this state.

(3711)

Sec. 48. [As amended by Chapter 1651, Public Laws, 1918]. Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. A copy of so much of said schedules as the commission shall deem necessary for the use of the public shall be printed in plain type, or typewritten, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public in such form and place as to be readily accessible and conveniently inspected, and as the commission may order. The commission may determine and prescribe the form in which the schedules, required by this section to be kept open to public inspection, shall be prepared and arranged, provided, that with respect to public utilities subject to the federal "Act to regulate commerce," so-called, the form of such schedules shall be that from time to time prescribed by the interstate commerce commission. No change shall be made in the rates, tolls, and charges which have been filed and published by any public utility in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rates, tolls or charges will go into effect. Whenever the commission receives such notice of any change or changes proposed to be made in any schedule filed under the provisions of this section, it shall have power either upon complaint as specified in section eighteen hereof, or upon its own motion and upon such notice as provided for in section

twenty hereof to hold a public hearing and make investigation as to the propriety of such proposed change or changes. After notice of any such investigation, the commission shall have power by any order served upon the public utility affected to suspend the taking effect of such change or changes pending the decision thereon, but not for a longer period than three months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation either upon complaint as specified in section eighteen hereof or upon its own motion, the commission may make such order in reference to any proposed rate, toll or charge as may be proper. At any such hearing involving any proposed increase in any rate, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the public utility: *Provided*, that the commission may, in its discretion and for good cause shown, allow changes within less time than required by the notice herein specified, and without holding the hearing and investigation herein provided for or modify the requirements of this section with respect to filing and publishing tariffs either in the particular instance or by general order applicable to special or particular circumstances or conditions.

(3719)

Sec. 56. The provisions of this chapter shall be interpreted and construed liberally in order to accomplish the purposes thereof, and where any specific power or authority is given the commission by the provisions of this chapter the enumeration thereof shall not be held to exclude or impair any power or authority otherwise in this chapter conferred on said commission. The commission shall have, in addition to the powers in this chapter specified, mentioned and indicated all additional, implied and incidental power which may be proper and necessary to effect and carry out, perform and execute all the said powers herein specified, mentioned and indicated. A substantial compliance with the requirements of this chapter

shall be sufficient to give effect to all the rules, orders, acts and regulations of the commission, and they shall not be declared inoperative, illegal, or void for any omission of a technical nature in respect thereto. Each section of this chapter, and every part of each section, are hereby declared to be independent sections, and the holding of any section or sections or part or parts thereof to be void, ineffective, or unconstitutional for any cause shall not be deemed to affect any other section or part thereof.

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APPENDIX B.

(a)

LAWS OF RHODE ISLAND, 1884, pp. 29-30.

AN ACT TO INCORPORATE THE NARRAGANSETT ELECTRIC LIGHTING COMPANY.

Passed May 29, 1884.

It is enacted by the General Assembly as follows:

SECTION 1. Isaac M. Potter, James G. Markland, Samuel W. Peckham, Henry C. Bradford, Frederick I. Marcy, Martin V. Brady, Nathaniel T. Spink and John B. Allen, their associates, successors and assigns, are hereby constituted a corporation by the name of "The Narragansett Electric Lighting Company," for the purpose of prosecuting a general electric lighting, heating and power business; that is to say, the business of producing, using and supplying light, heat and power generated by means of electricity; and for the transacting of other business connected therewith; with all the powers and privileges, and subject to all the duties and liabilities set forth in chapters 152 and 155 of the Public Statutes, and in the statutes in amendment thereof, and in addition thereto.

SEC. 2. The capital stock of said corporation shall not exceed one hundred and fifty thousand dollars, to be fixed in amount from time to time, and to be divided into such number of shares, and the par value of each share to be fixed at such amount as the corporation may by vote determine; and said shares shall be non-assessable.

SEC. 3. The stock or shares of every stockholder shall be pledged and liable to the corporation for all debts and demands due and owing from such stockholder to the corporation, and whether overdue or due at a future day; and said stock or shares may be sold for the payment of such debts and demands in such manner as the by-laws of said corporation may prescribe; and in case the proceeds of such sale shall be insuffi-

cient to discharge such debts or demands, with the incidental expenses of sale, the corporation may have their action against the debtor for the balance due.

SEC. 4. Said corporation, with the consent of the town and city councils where wires and conductors for electricity are to be put up, laid, used and maintained, may put up, lay, use and maintain wires and conductors for electricity, under and over highways, streets and sidewalks, and, with the written consent of the owners thereof, upon and over buildings, subject to such ordinances, regulations and orders of the city and town councils of the cities or towns where such wires or conductors shall be maintained, as are or may be enacted with respect to such wires and conductors; and said wires and conductors located above any highway shall be removed whenever required by general law or by order of such city or town council, after thirty days' notice in writing shall be given to said corporation; and said corporation shall be entitled to no compensation on account of such removal.

SEC. 5. There shall be an annual meeting of the stockholders, in the city of Providence, at such time as the by-laws shall prescribe, for the choice of officers, and for such other business as may come before them.

SEC. 6. Said corporation shall have an office or place of business in the city of Providence.

SEC. 7. This act shall take effect from and after its passage.

APPENDIX B.

(b)

LAWS OF RHODE ISLAND, 1917, pp. 341-348.

AN ACT IN AMENDMENT OF AN ACT, ENTITLED "AN ACT TO INCORPORATE THE NARRAGANSETT ELECTRIC LIGHTING COMPANY", PASSED AT THE MAY SESSION OF THE GENERAL ASSEMBLY, A. D. 1884, AND THE SEVERAL ACTS IN AMENDMENT THEREOF AND RELATING THERETO.

Approved April 19, 1917.

It is enacted by the General Assembly as follows:

Section 1. The Narragansett Electric Lighting Company, a corporation created by an act of the general assembly, passed at its May session, A. D. 1884, and engaged in a general electric lighting, heating and power business, and for that purpose owning, leasing or controlling lines of a voltage of 11,000 volts or more for the transmission of electricity, is hereby authorized and empowered to complete or extend any such lines of a voltage of eleven thousand volts or more as it may from time to time own, lease or control, or any lines of such voltage operated or designed to be operated in connection therewith by acquiring and taking from time to time such additional lands and interests, estates and rights in lands (but not including the right to acquire or take under the provisions of this act any water power) as it may from time to time require for any such lines of the aforesaid voltage or for completing or extending any of the same and in the manner hereinafter provided: *Provided, however,* that all rights under this act in the city of Providence are hereby confined to the location of such lines extending from the power station of the Narragansett Electric Lighting Company on the westerly side of the Providence river generally southerly and then across said river to a point (detailed description follows) . . . but nothing herein contained shall be construed as granting said corpora-

tion any right to locate any of the same in, over or across any street or highway in said city; *and provided, further*, with respect to the taking of any portion of the land, location or right of way of any railroad, street railway or other public service company in said city, that said rights shall be subject to the provisions of Section 3 of this act; *and provided, further*, that said rights in the city of Providence shall be exercised within two years from and after the passage of this act and not thereafter; *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands that shall have been acquired or may hereafter be acquired by any city or town for municipal or public purposes, except in such reasonable locations as may be approved by the city council of such city or the town council of such town: *Provided, further*, that said corporation shall not take under the provisions of this act any portion of any public street or highway of any town or city in this state or any other lands or interests, estates or rights in lands that shall have been acquired by any town or city in this state for municipal or public purposes, except in such reasonable locations as may be approved by the town council or city council of such town or city, respectively; and that said corporation shall not take under the provisions of this act, any lands, interests, estates or rights in lands in any town or city in said state except in such reasonable locations as may be approved by the town council or city council of such town or city, respectively; *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands in the town of East Providence lying southerly on a line running from a point on the shore of the Providence river (detailed description follows) . . . *and provided, further*, that said corporation shall not take under the provisions of this act any lands or any interests, estates or rights in any lands after the expiration of ten years from and after the date of the passage of this act.

Sec. 2. Whenever said corporation desires to take any lands

interests, estates or rights therein it may proceed to acquire the right to use such land and to acquire such estate or easement in such land as it may deem necessary for its said corporate purposes in the following manner; said corporation shall present a petition to the superior court of the State of Rhode Island, in the county where such right, easement or estate is required, setting forth the right, easement or estate required, the name or names of the owner or owners (then follow details of procedure for hearing on the petition). . . .

(Page 345:)

At the time fixed for said hearing the said court if it shall find the use and taking of the right, easement or estate mentioned in said petition to be necessary for its said corporate purposes shall thereupon appoint three disinterested persons resident of the county, commissioners to assess and appraise the damages (then follow details for assessment and appraisal of damages).

. . .

(Page 347:)

Sec. 3. Nothing in this act shall authorize the Narragansett Electric Lighting Company to condemn any portion of the land, location or right of way of any railroad, street railway or other public service company, except for the purpose of crossing the same either above or below grade and of maintaining suitable and convenient supports for such crossing, in such manner as not to render unsafe, or to impair the usefulness of such land, location or right of way for railroad or street railway purposes or the purposes of such public service company. If said corporation and any such railroad, street railway or public service company are unable to agree as to the method and manner of the construction and maintenance of any such crossing, either may apply to the public utilities commission for a determination thereof, and, after hearing, such crossing shall be constructed and maintained in such method and manner as may be ordered by said commission. Either party aggrieved by such order of said commission may appeal

to the supreme court in the manner provided by Section 34 of the public utilities act. Said corporation shall be liable to any such railroad, street railway or public service company for such damages and reasonable expense as may result to it by reason of any line of said corporation crossing such railroad, street railway or public service company's land, location or right of way.

Sec. 4. Said corporation may convey any such transmission line or any part thereof or right or interest therein, and the rights acquired for the same, to any other corporation, company or association having the right to carry on the electric light, heat or power business in the town or city where such line or part thereof is located, or may enter into an agreement giving to any such corporation, company or association the right to use any such line or part thereof, or agreeing to transmit electricity for any such corporation, company, or association over such line or part thereof.

Sec. 5. The act incorporating said Narragansett Electric Lighting Company and the various amendments thereto are hereby amended in accordance with the provisions of this act.

Sec. 6. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect from and after its passage.

APPENDIX B.

(c)

LAWS OF RHODE ISLAND, 1918, pp. 253-255.

AN ACT IN AMENDMENT OF AN ACT, ENTITLED "AN ACT IN AMENDMENT OF AN ACT ENTITLED 'AN ACT TO INCORPORATE THE NARRAGANSETT ELECTRIC LIGHTING COMPANY,' PASSED MAY 29, 1884, AND THE SEVERAL ACTS IN AMENDMENT THEREOF *and* RELATING THERETO," PASSED AT THE JANUARY SESSION, A. D. 1899.

Approved April 29, 1918.

It is enacted by the General Assembly as follows:

SECTION 1. Sections 1, 2, 3 and 4 of the Act entitled "An Act in amendment of an Act entitled, 'An Act to incorporate the Narragansett Electric Lighting Company,' passed May 29, 1884, and the several Acts in amendment thereof and relating thereto," passed at the January session, A. D. 1899, are hereby amended so as to read as follows:

"SECTION 1. In addition to the powers heretofore granted to the Narragansett Electric Lighting Company, said corporation is hereby authorized and empowered from time to time to acquire by lease, purchase or otherwise, on such terms and conditions as may be agreed upon, and to possess, use, exercise, and dispose of the ownership or control of any right, property or franchise held by any person, corporation or association engaged in or authorized to engage in a business similar to that of said corporation or to produce or furnish light, heat or power. And said Narragansett Electric Lighting Company may issue its capital stock or bonds at not less than par, in payment therefor; and any corporation or association which shall own or hold such rights or franchises may sell or lease the ownership or control of the same to said Narragansett Electric Lighting Company and receive such stock or bonds in payment therefor; and the capital stock

of said Narragansett Electric Lighting Company when issued as aforesaid shall be deemed to be fully paid and non-assessable."

"SEC. 2. Said corporation is hereby authorized and empowered to acquire, to hold, and to dispose of the stock, shares, bonds, securities and obligations issued by any other corporation or association engaged in or authorized to engage in a business similar to its own or to produce or furnish light, heat or power, and may issue its capital stock and bonds at not less than par in payment for the same, and any stock so issued shall be deemed full-paid and non-assessable."

"SEC. 3. Said corporation is hereby authorized and empowered from time to time to guarantee the stocks, shares and bonds, and the dividends and interest thereon, of any corporation or association established for purposes similar to its own or for the purpose of producing or furnishing light, heat or power."

"SEC. 4. Said corporation is hereby authorized and empowered to increase its capital stock from time to time and in such amounts as may be required in the exercise of the powers granted by this act and the several acts of which it is an amendment, to an amount not exceeding the amount of its capital stock as now or hereafter authorized. Said corporation may also guarantee the payment of bonds and obligations and dividends of profits on stocks of other similar corporations and associations, and corporations or associations authorized to engage in the business of producing or furnishing light, heat or power, controlled by it, and as security for the same and for the payment of bonds, notes, and other obligations originally issued by itself in the prosecution of its business may mortgage all or any part of its property and franchises."

SECTION 2. This Act shall take effect on and after its passage.

APPENDIX C.

CONNECTICUT, GENERAL STATUTES (1918).

SEC. 3635. *Rates and service affecting many persons.* Any town, city or borough within which, or between which and any other town, city or borough in this state, any public service company is furnishing service, or any ten patrons of any such company, or any such company furnishing service in accordance with, or at rates prescribed by, an order of the commission, may bring a written petition to the commission alleging that the rates or charges made by such company or prescribed by the commission are unreasonable, or that the service furnished by such company is inadequate to, or the service ordered by the commission exceeds, public necessity and convenience. Thereupon the commission shall fix a time and place for a hearing upon such petition, and shall mail notice thereof to the parties in interest and give due public notice thereof at least one week prior to such hearing. Upon said hearing the commission may, if it finds such rates and charges to be unreasonable, or such service to be inadequate or excessive, determine and prescribe an adequate service to be thereafter furnished or just and reasonable maximum rates and charges to be thereafter made by such company, and such company shall thereafter furnish the service so prescribed, and shall not thereafter demand any rate or charge in excess of the maximum rate or charge so prescribed.

MAINE, REVISED STATUTES (1916).

Chapter 55, Section 43. *Complaints against public utilities.*
C. 129, §41. Upon written complaint made against any public utility by ten persons, firms, corporations or associations aggrieved, that any of the rates, tolls, charges or schedules or any joint rate or rates of any public utility are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act of said public utility is in any respect unreasonable, insufficient or unjustly discrimin-

atory, or that any service is inadequate or cannot be obtained, the commission, being satisfied that the petitioners are responsible and that a hearing is expedient, shall proceed with or without notice, to make an investigation thereof. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practices or acts complained of shall be entered by the commission without a formal public hearing.

MASSACHUSETTS, GENERAL LAWS (1921).

Chapter 159. *Common Carriers.*

SECTION 14. Whenever the department shall be of opinion, after a hearing had upon its own motion or upon complaint, that any of the rates, fares or charges of any common carrier for any services to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered, the department shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed, and shall fix the same by order to be served upon every common carrier by whom such rates, fares and charges or any of them are thereafter to be observed. Every such common carrier shall obey every requirement of every such order served upon it, and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees. If, upon investigation, the department finds that in any case it is consistent with the public interests to authorize a common carrier to make its charge for transportation less for a longer than for a shorter distance, the department may grant such authority and may from time to time modify or revoke the same.

If complaint is made to the department concerning any rate, fare or charge demanded and collected by any railroad corporation for any service performed and the department finds

after hearing and investigation that an unjustly discriminatory rate, fare or charge has been collected for any service, the department may order the railroad corporation which has collected the same to make due reparation to the person who has paid the same, with interest from the date of the payment of such unjustly discriminatory amount; but such order of reparation shall cover only payments made within two years before the date of filing the petition seeking to have reparation ordered. Such order may be made without formal hearing whenever the railroad corporation affected shall assent in writing thereto, or file or join in a petition therefor, but in no case shall any such order be made until the department shall be satisfied by such investigation as may be necessary that the rate, fare or charge collected was in fact unjustly discriminatory.

SECTION 24. Upon written complaint, relative to the service or charges for service in, to or from any city or town as rendered or made by any company engaged therein in the transmission of intelligence by electricity, by the mayor or selectmen, or by twenty customers of the company, the department shall grant a public hearing, first giving to the complainants and the company reasonable written notice of the time and place thereof. On written complaint of the mayor, selectmen or twenty legal voters of a city or town within which any railroad or railway is located, alleging grounds of complaint, the department shall examine the condition and operation of such railroad or railway, first giving to the complainants and the corporation or company reasonable written notice of the time and place thereof.

Chapter 164. Manufacture and Sale of Gas and Electricity.

SECTION 93. On written complaint of the mayor of a city or the selectmen of a town where a gas or electric company is operated, or of twenty customers thereof, either as to the quality or price of the gas or electricity sold and delivered, the department shall notify said company by leaving at its office a copy of such complaint, and shall thereupon, after notice, give

a public hearing to such petitioner and said company, and after said hearing may order any reduction in the price of gas or electricity or an improvement in the quality thereof, and a report of such proceedings and the result thereof shall be included in the report required by section seventy-seven. The maximum price fixed by such order shall not thereafter be increased by said company except as provided in the following section.

NEW HAMPSHIRE, PUBLIC LAWS (1926).

Chapter 238. *Complaints and Investigations.*

SECTION 5. *Public Utilities.* Upon complaint made by the city council or mayor of any city, or by the selectmen of any town, in which a public utility is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or to supply water, or to transmit telephone or telegraph messages, or upon the complaint in writing of not less than one hundred customers or subscribers of such public utility in cities of thirty thousand or more inhabitants, or of not less than fifty in cities of twenty thousand or more inhabitants, or of not less than twenty-five in any other city or town, or upon petition of a public utility, as to the quality of the service furnished by such public utility, or that the charges made therefor are excessive or insufficient, or concerning proposed future rates, the commission shall investigate as to the cause for such complaint or petition, and, after notice and hearing, may make such order, if any, as may in its opinion be necessary to establish just and reasonable rates or charges or to require the making of any reasonable and just improvements in service or methods.

SECTION 6. *Independent Inquiry.* The commission may, of its own motion, investigate or make inquiry in a manner to be determined by it, as to any rate charged or proposed to be charged or as to any act or thing done or omitted to be done by any railroad corporation or public utility, and the commission shall make such inquiry in regard to any act or thing

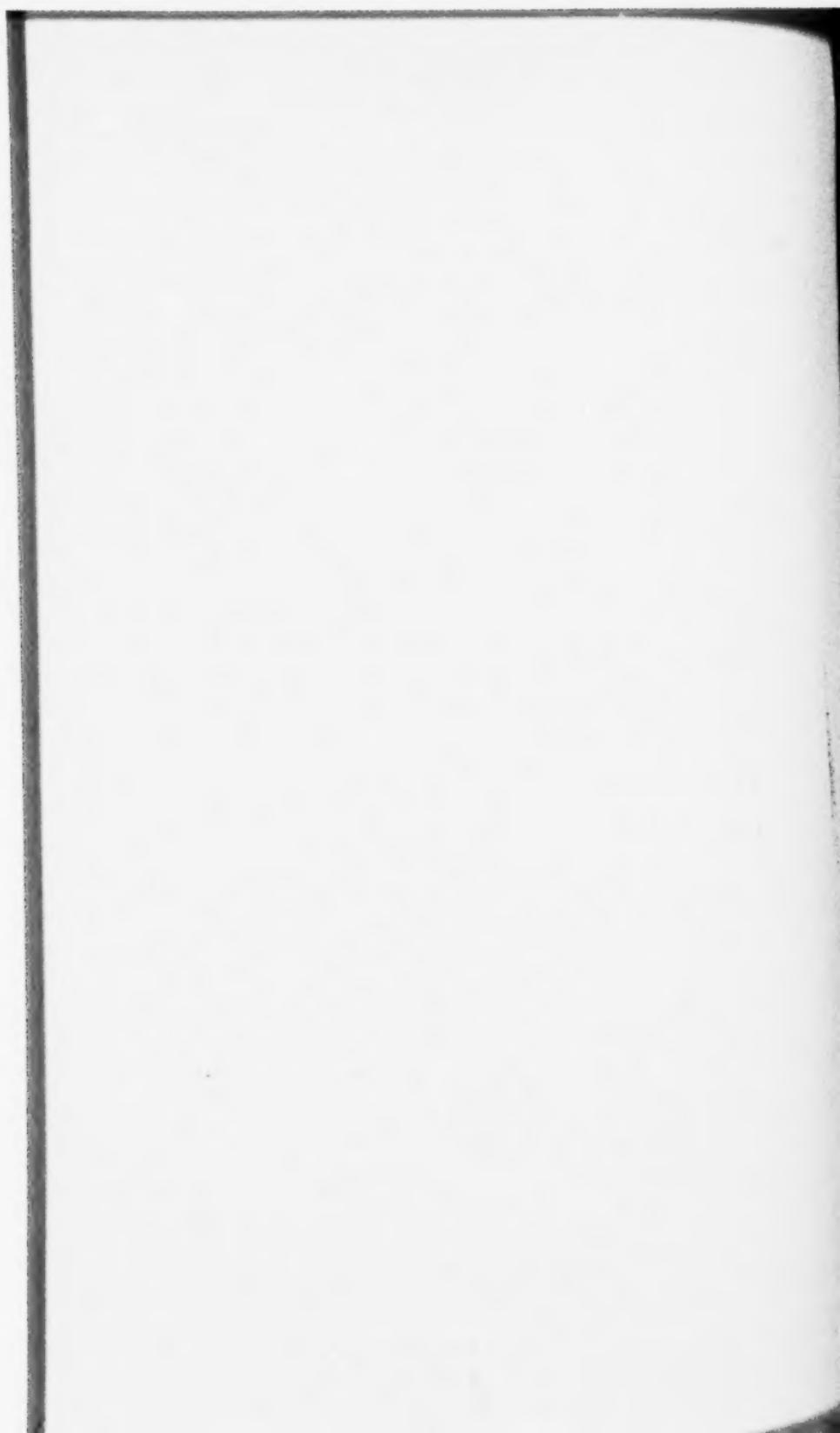
done or omitted to be done by any such railroad corporation or public utility in violation of any provision of law or order of the commission.

NEW YORK, PUBLIC SERVICE COMMISSION LAW, § 71 as amended by Laws of 1921, c. 134, §48.

§ 71. Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints. Upon the complaint in writing of the mayor of a city, the trustees of a village, or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than twenty-five customers or purchasers of such gas or electricity, or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity or pressure or the rates, charges or classifications of service of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or the rates charged or classification of service of electricity sold and delivered in such municipality, the commission shall investigate as to the cause for such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation in manufacturing, transmitting and supplying such gas or electricity, and may examine or cause to be examined the books and papers of such person, or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

WISCONSIN, STATUTES (1921).

Complaint by consumers. Section 1797m-43. Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by any twenty-five persons, firms, corporations or associations, that any of the rates, tolls, charges or schedules or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power or any service in connection therewith or the conveyance of any telephone message or any service in connection therewith is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act complained of shall be entered by the commission without a formal public hearing. (1907, c. 499.)



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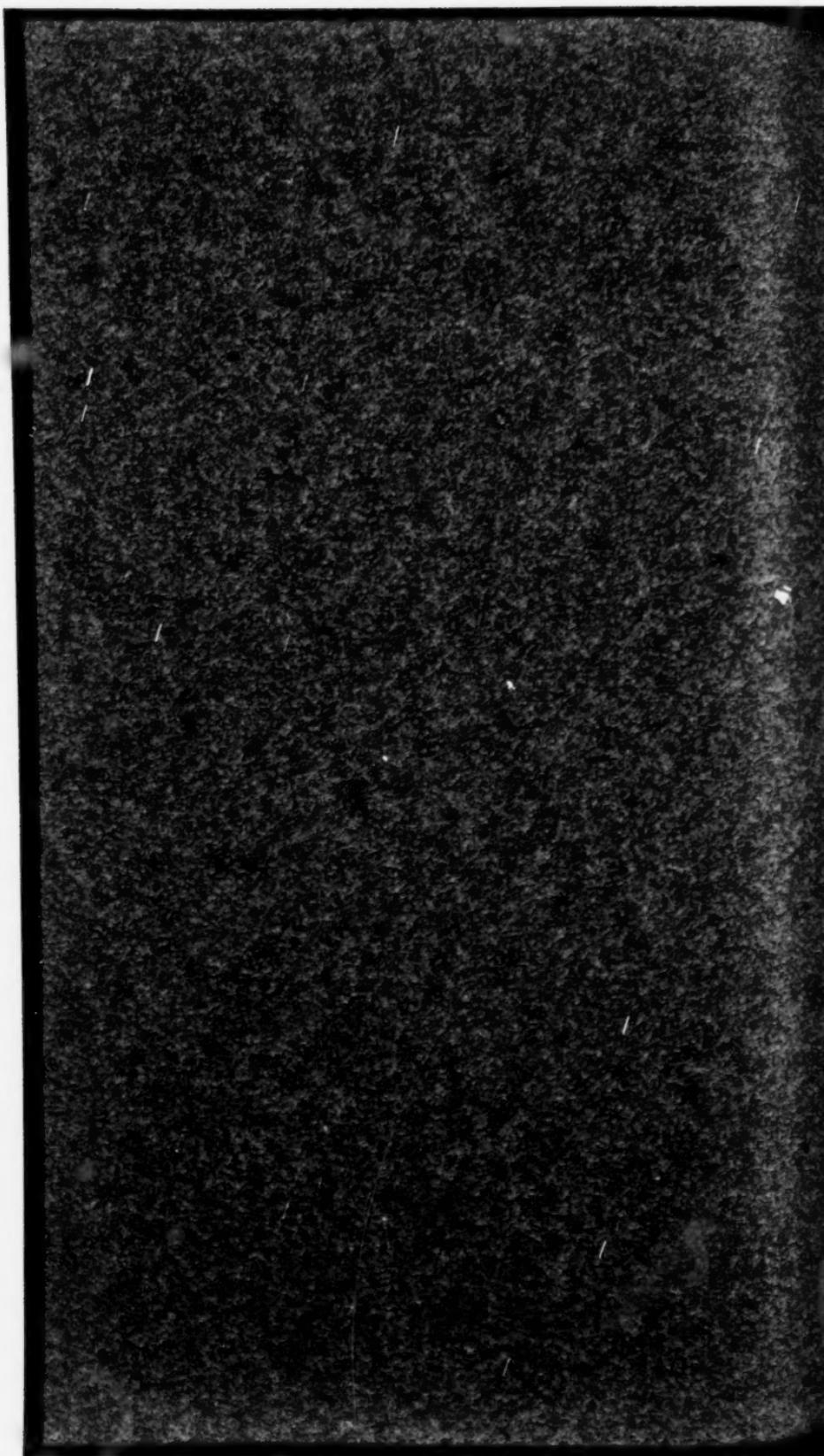
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Supreme Court of the United States

OCTOBER TERM, 1925.

PUBLIC UTILITIES COMMISSION OF RHODE
ISLAND ET AL., *Petitioners*,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The object of this petition is to have this court review a decree entered by the Supreme Court of Rhode Island on July 22, 1925, whereby that court sustained an appeal of the present respondent from an order made by the Public Utilities Commission of Rhode Island which purported to set aside a contract between the respondent and the Narragansett Electric Lighting Company (hereinafter called "the Narragansett Company") fixing the rate for electrical energy supplied by the Narragansett Company to the respondent and to establish a much higher rate for the same service. The court, in an opinion not yet officially reported but set out in the record (pp. 438-447), held in substance that the Public Utilities Commission had no jurisdiction to interfere with the contract and that its order was illegal and void.

Several federal questions were argued before the Supreme Court of Rhode Island and no contention is made by the respondent as to the jurisdiction of this court to review the decision,—so far as concerns these questions,—upon certiorari. It is submitted, however, that the present petition should be denied both as a matter of discretion and because the decision of the Supreme Court of Rhode Island was plainly right.

STATEMENT OF THE CASE.

The facts, so far as now material, may be summarized as follows:—

The respondent (which is a Massachusetts corporation) has been for many years engaged in supplying electricity for private and public consumption throughout the city of Attleboro, Massachusetts. The Narragansett Company was incorporated on May 29, 1884, by a special act of the General Assembly of Rhode Island, the first section of which is as follows and which is printed in full as an appendix to this brief:—

“Isaac M. Potter, James G. Markland, Samuel W. Peckham, Henry C. Bradford, Frederick I. Marcy, Martin V. Brady, Nathaniel T. Spink and John B. Allen, their associates, successors and assigns, are hereby constituted a corporation by the name of ‘The Narragansett Electric Lighting Company,’ for the purpose of prosecuting a general electric lighting, heating and power business; that is to say, the business of producing, using and supplying light, heat and power generated by means of electricity; and for the transacting of other business connected therewith; with all the powers and privileges, and subject to all the duties and liabilities set forth in chapters 152 and 155 of the Public Statutes, and in the statutes in amendment thereof, and in addition thereto.”

The chapters in the Public Statutes of Rhode Island, 1882, thus referred to are those entitled "Provisions respecting corporations in general" and "Of manufacturing corporations" respectively; neither of these chapters contains anything purporting to reserve to the State any authority to regulate rates or anything affecting the power of a corporation to contract with respect to its charges. Ever since its incorporation the Narragansett Company has maintained in Providence an electric generating plant and has supplied electricity in Providence and its vicinity.

The Public Utilities Commission was established by Chapter 795 of the Public Laws of 1912 of Rhode Island (known as the "Public Utilities Act"). Sections 1, 2, 3, 18, 20, 21, 26, 27, 28, 34 (in part), 39, 40 and 56 of this act are printed as an appendix to the petitioners' brief. It is believed that the only other parts of the act material to the present petition are §§ 34 (in full), 36, 37, 42 and 48, which are printed at the close of this brief.

Under date of May 8, 1917, the two companies entered into a contract whereby the Narragansett Company undertook to sell and deliver to the respondent during the term of twenty years from the date of the contract all the electrical energy then or at any time thereafter used by it and supplied to its customers in Attleboro, payment to be made at a rate specified in the contract and all such electrical energy to be delivered at the state line between the town of East Providence, Rhode Island, and the town of Seekonk, Massachusetts (Record, p. 256). The contract was not sought by the respondent, but was solicited by the Narragansett Company (Record, pp. 117, 136, 401). On May 14, 1917, the Narragansett Company filed with the Commission a schedule (designated as R. I. P. U. C. No. 68) setting out the rate specified in the contract, and requested that the same be approved as a special rate under § 42 of the Public

Utilities Act (Record, p. 253). This schedule, which is reproduced in full on page 275 of the Record, contains the following item:—

“TERM OF CONTRACT

“Twenty (20) years and thereafter unless discontinued by either party.”

On May 23, 1917, the Commission entered an order reciting that the Narragansett Company was “authorized to grant a special resale rate to the Attleboro Steam & Electric Company at the state line between Rhode Island and Massachusetts, said rate to be as shown in the tariff of said Narragansett Electric Lighting Company, R. I. P. U. C. No. 68” (Record, p. 390).

The two companies duly entered upon the performance of the contract and electricity has been supplied in accordance with its terms ever since, the respondent’s plant having been dismantled (Record, p. 117). The Narragansett Company, however, presently became dissatisfied with the contract and on April 6, 1921, filed with the Commission a schedule entitled R. I. P. U. C. 101, which purported to supersede the rate specified in the contract and to establish a rate materially higher (Record, p. 391). On April 27, 1921, the Commission, after an *ex parte* hearing, made an order purporting to waive as to the proposed rate the requirements of § 48 of the Public Utilities Act respecting notice to the Commission and to the public (Record, p. 394). The Narragansett Company demanded that the respondent pay at the increased rate for all electrical energy furnished thereafter and threatened to cut off the supply if this demand were not complied with. The Attleboro Company thereupon brought in the United States District Court a suit to restrain the Narragansett Company from carrying out this threat. This suit was heard by Judge Brown, who rendered an opinion (which is made a part of the record

in the present case, pp. 1-22) leaving open the question whether the Commission had power after a formal public hearing to establish a rate inconsistent with that specified in the contract, but holding that, in any view of the case, the mere filing of a new rate by the Narragansett Company and waiving of the statutory notice by the Commission was not enough to relieve the Narragansett Company from its obligations under the contract.

Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. Rep. 895.

On April 4, 1924, there was entered in accordance with this opinion a final decree enjoining the Narragansett Company as prayed in the bill with a proviso to the effect that nothing contained in the decree should be construed as affecting the rights of the parties in case the Commission should assume after notice and a formal public hearing to establish a rate inconsistent with that specified in the contract.

On May 7, 1924, the Narragansett Company filed with the Commission a schedule designated as R. I. P. U. C. 125, setting out a rate applicable to all service rendered by the Narragansett Company to the respondent, which rate is materially higher than that specified in the contract and is otherwise inconsistent with the contract and with the provisions of the schedule R. I. P. U. C. 68 (Record, p. 29). On the same day the Commission, at the solicitation of the Narragansett Company (Record, p. 23), notified the respondent that on its own motion it ordered "an investigation and public hearing upon the question of whether the existing rates, tolls and charges of the Narragansett Electric Lighting Company now charged to the Attleboro Steam & Electric Company or those proposed to be charged to said company and other electric lighting companies under said rate schedule R. I. P. U. C. No. 125 cancelling R. I. P. U. C. No. 68

and No. 101 are unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act of the State of Rhode Island and otherwise upon the question as to the propriety of the proposed change or changes embodied in said Schedule No. 125," the hearing to be held on May 26, 1924. The reference in this notice to the rates charged to "other electric lighting companies under said rate schedule R. I. P. U. C. No. 125" was nugatory, because the respondent was avowedly the only customer affected by that schedule (Record, pp. 94, 96). Upon the opening of the hearing, the respondent appeared by its attorneys and represented that the Commission had no jurisdiction to hold the proposed investigation or to establish the rate specified in the schedule R. I. P. U. C. 125 in substitution for that specified in the contract and in the schedule R. I. P. U. C. 68 or to make any order inconsistent with the terms of the contract for the reason, among others, that any action so taken would be repugnant to the Constitution of the United States (Record, pp. 51-54). The Commission overruled all these jurisdictional objections and assumed to proceed with the hearing substantially as if the service in question was strictly intrastate and as if the only question was what rate for service rendered the respondent would yield the Narragansett Company the profit to which it conceived itself to be entitled upon its business generally. On January 21, 1925, the Commission filed an opinion which concluded as follows (Record, p. 420):—

"It is therefore ORDERED:

"(1) That the rates contained in Schedule R. I. P. U. C. No. 68 of the Narragansett Electric Lighting Company, are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act, and

"(2) That the rates contained in Schedule R. I. P. U. C.

No. 125 of the Narragansett Electric Lighting Company are just and reasonable, and may be allowed to become effective on all electricity delivered on and after February 1, 1925."

The respondent, being uncertain as to whether under the terms of the Public Utilities Act it had a right to appeal from the order of the Commission, filed simultaneously in the Supreme Court of Rhode Island a claim of appeal and a petition for certiorari. The grounds of appeal (Record, pp. 422-426) may be summarized as follows:—

- (a) The Commission acted without jurisdiction;
- (b) There was no evidence to justify the setting aside of the contract rate and the establishing of the new rate;
- (c) The Public Utilities Act, if construed as purporting to give the Commission jurisdiction to make the order in question, is repugnant to the Constitution of the United States—
 - (i) As improperly interfering with interstate commerce;
 - (ii) As depriving the respondent of the equal protection of the laws;
 - (iii) As depriving the respondent of its property without due process of law;
 - (iv) As impairing the obligation of the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract;
- (d) If the Public Utilities Act be so construed, the Commission's order is repugnant to the Constitution of the United States for similar reasons;
- (e) The order of the Commission, even if not invalid as matter of law, is plainly wrong as opposed to the great weight of the evidence.

The Supreme Court of Rhode Island, after deciding that the respondent's remedy was by appeal, proceeded, without considering the many other points argued, to deal with the basic question whether it was competent for the State to fix the rates to be charged for an interstate service like that called for by the contract and came to the conclusion that it was not (Record, pp. 438-477). A final decree reversing the order of the Commission and directing that the proceeding be dismissed was accordingly entered (Record, p. 448).

ARGUMENT.

The grounds upon which the present petition is opposed are briefly these:—

1. The decision of the Supreme Court of Rhode Island upon the question of interstate commerce should not be disturbed both as a matter of discretion and because it was right on the merits.

2. Even if the ruling of the Supreme Court of Rhode Island had been wrong upon the question of interstate commerce, the result would have been the same, because the order of the Public Utilities Commission was in other respects subject to fatal constitutional objections.

(a) If the Public Utilities Act applies to service rendered to customers in other States, it so discriminates against them as to deprive them of the equal protection of the laws.

(b) The respondent under the order in question is deprived of its property without due process of law.

(c) The contract between the respondent and the Narragansett Company cannot be set aside without impairing the obligation of the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract rate for the full term of twenty years.

3. The petitioners' contention that the Narragansett Company had by its charter power to contract only subject to regulation by the Public Utilities Commission was not raised in the state court and presents no federal question.

4. The state court has never decided that the Public Utilities Act according to its true construction gives the Commission jurisdiction to make an order like that in

question, even if the act would not be unconstitutional if so construed.

5. If the order of the Commission had not been open to jurisdictional objections, it must nevertheless have been reversed, because opposed to the great weight of the evidence.

I.

THE DECISION OF THE STATE COURT UPON THE QUESTION OF INTERSTATE COMMERCE SHOULD NOT BE DISTURBED.

The present case is peculiarly one in which any possible doubt as to the expediency of reviewing the decision of the state court should be resolved in favor of the respondent. What this court in the last analysis is asked to do is to mediate between two governmental agencies of the State of Rhode Island. The Public Utilities Commission acting upon its own initiative has assumed to take certain action and the Supreme Court, which under the statutes of Rhode Island has full jurisdiction in the premises, has adjudged that the Commission has exceeded its powers. If the tribunal duly established by the laws of Rhode Island to determine such questions has decided adversely to the Commission, this court will not, it is apprehended, be eager to disturb that decision. It is true, of course, that the immediate pecuniary interest involved is that of the Narragansett Company, which, while it did not initiate the proceedings in question, has been zealous in promoting them. This, however, does not alter the situation. The contract between the Narragansett Company and the respondent can be overridden, if at all, only because the public interest so demands; the benefit that will accrue to the Narragansett Company is of no consequence except as the

prosperity of that company may be of public benefit. The present petition, therefore, is really nothing but an attempt on the part of the State of Rhode Island to overturn a decision rendered by the body which it has established for the precise purpose of dealing with such matters. That it is not the function of this court thus to relieve the States from the decisions of their own tribunals seems too plain for discussion.

Even if viewed from the standpoint of the Narragansett Company, the case is not calculated to appeal to the discretion of the court. There is no contention that the contract was not freely and fairly made; as pointed out above, the Narragansett Company actually solicited it. There can be no question but that the contract is binding and ought to be performed unless either the State of Rhode Island or the United States has established some instrumentality whereby it may be abrogated. It is certain that the United States has taken no action of this kind; neither has the State of Rhode Island, according to the decision of its highest tribunal. After the State through its Supreme Court has thus declared that it cannot offer the Narragansett Company an implement whereby to break its contract, that company asks this court to decide that the State is mistaken as to the extent of its governmental machinery and that it really possesses such an implement, although its own court was unable to discover it. Even if the case were less clear on the merits than it is, the present petition might be disposed of on this ground.

The decision of the Supreme Court of Rhode Island was, however, plainly right. The petitioners concede that the transmission of electricity from one State to another constitutes interstate commerce. This being so, the only question is whether there is anything to take the case out of the general rule that rates for interstate service

rendered by a public utility cannot be fixed by state action. The petitioners are, of course, obliged to recognize the close parallel between the facts of this case and those in *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298. In the attempt to distinguish that case they rely upon two classes of cases, neither of which, it is submitted, has any bearing upon the present situation.

One of these classes relates to state laws establishing in general terms police regulations applicable to interstate and intrastate commerce alike. It has often been held that, while Congress may legislate on these subjects because such legislation is incidental to the power to regulate interstate commerce and while a federal statute so enacted is supreme, state laws dealing with matters of this kind do not constitute regulations of interstate commerce and so are valid in the absence of action by Congress. The principle was stated as follows by Mr. Justice Matthews in a leading case involving a state statute prescribing the qualifications of locomotive engineers:—

"The provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they are parts of that body of the local law which . . . properly governs the relation between carriers of passengers and merchandise and the public who employ them."

Smith v. Alabama, 124 U. S. 465 (at p. 480).

This doctrine is irrelevant to the case at bar, because it has been recognized for many years that a statute or order prescribing the rates to be charged for interstate service is primarily and necessarily a regulation of interstate commerce.

Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S. 557.

The other class of cases cited by the petitioners deals with those few peculiar situations in which the business in question, although constituting interstate commerce, is so highly localized that it is regarded as consistent with the interstate commerce clause for the States to regulate such business in the absence of action by Congress. *Pennsylvania Gas Co. v. New York*, 252 U. S. 23, and *Public Utilities Commission v. Landon*, 249 U. S. 236, which are cited by the petitioners, are cases of this kind. The dissimilarity between those cases and the present is patent; in each the product, after being brought into the State, was broken up and distributed at retail and it was this retail distribution which the State was held competent to regulate. In other words, the situation was the same as would arise if Massachusetts should undertake to fix the rates at which electricity should be supplied by the respondent to its miscellaneous customers in Attleboro; the fact that the electric current came from outside the State would not affect the power of Massachusetts to fix rates unless Congress had enacted inconsistent legislation. In the case at bar, the service is not the distribution in one State of something produced in another State; the essence of the contract is the transmission of the product across the state line. The service is, moreover, strictly wholesale, the entire product being transmitted to a single recipient, who performs independently the local service of distribution. Under these circumstances, the Supreme Court of Rhode Island was clearly right in treating the following passage from the opinion in *Missouri v. Kansas Natural Gas Co.* (265 U. S. at p. 309) as controlling:—

“In both cases [*Public Utilities Commission v. Landon* and *Pennsylvania Gas Co. v. New York*] the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is

clearly recognized in the *Landon Case*. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

The petitioners further contend that, if Rhode Island cannot regulate the rates to be charged by the Narragansett Company for interstate service, the power to fix the rates charged to local consumers is to a certain extent restricted. That, of course, is true, but it is of no consequence, because the supposed difficulty is no different from that which always obtains when a public utility is rendering both intrastate and interstate service. The argument applies equally to railroad rates, for example, yet no one would pretend that it was of any force with regard to such rates. The passage which the petitioners on page 23 of their brief quote in this connection from Judge Brown's opinion (295 Fed. Rep. at p. 897) is of no significance, not only because it is a mere dictum, but because it antedates the decision in *Missouri v. Kansas*

Natural Gas Co., which establishes conclusively the immateriality of such considerations.

Another contention made by the petitioners is that the interstate service is only a small part of the service rendered by the Narragansett Company and that therefore the regulation of the interstate business should be deemed indirect and incidental. This argument is hardly consistent with the petitioners' other positions; if the interstate service is so small a part of the whole service performed by the Narragansett Company that the maxim *de minimis*, etc., applies,—for this is really what the argument comes to,—no hardship can result to Rhode Island consumers if the interstate business remains unregulated. Apart from this, however, the unsoundness of the contention is obvious. It is difficult to conceive of anything constituting a more direct regulation of interstate service than an order prescribing the rate at which it shall be performed. This is forcefully pointed out by the Supreme Court of Rhode Island in the case at bar (Record, pp. 446-447):—

"The intrastate and interstate business of the Narragansett Company can be segregated. This separation has actually been made by that company and the Commission in establishing a basis for the proposed new rate. The effect of the action of the Commission was direct on interstate commerce and incidental on local and state commerce. Such being the case there is no difference in principle because of the amount of interstate commerce involved, whether it is much or little, at wholesale or retail. The purpose of the state action is immaterial if the result is to impose a direct burden on interstate commerce."

It is to be remembered in this connection, moreover, that the order now in question is not like a speed law, for example, which applies to all classes of traffic alike, but

is avowedly aimed solely at the respondent and will not affect any other consumer (Record, pp. 94, 96). Hence it is unnecessary to consider what the rule would be if the respondent was only one of many customers affected by the order and if the others were all in Rhode Island.

It is suggested that the present case is taken out of the usual rule by the fact that the electric current is delivered at the state line, so that the rate is in a sense the price charged for a sale at that line. This contention, it is believed, needs no serious discussion. It is well established that, if goods brought from without a State are offered for sale at a point within the State in the original packages and before they have become mingled with the general mass of property within the State, the sale is not subject to state regulation. *A fortiori*, a State cannot fix the price to be charged when the seller stands on one side of the state line and the buyer on the other and the sale is effected by handing the goods across. The following language from the opinion in *Missouri v. Kansas Natural Gas Co.* is directly in point (265 U. S. at p. 308):—

"The sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become a part of the general mass of property therein."

The principle applies, of course, to burdens placed upon products going out of a State no less than to burdens upon those coming into it. As was said by Mr.

Justice VanDevanter in *Pennsylvania v. West Virginia*, 262 U. S. 553 (at p. 596):—

“Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce,—a prohibited interference.”

A final point urged by the respondents is that the Narragansett Company is operating under franchises granted by the State whose power to regulate its rates is in question, relying on the concluding words of the opinion in *Missouri v. Kansas Natural Gas Co.* (265 U. S. at p. 310):—

“That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Company is not so operating and is not made a party to these franchises by merely doing business with the franchise holders.”

The short answer to this argument is that the record discloses nothing as to the character of the franchises under which the Narragansett Company is rendering the service in question beyond the bare fact that its right to maintain wires in the highways, etc., has presumably been granted by the State or by some municipality. This alone is plainly immaterial. Almost every public utility operates under state or municipal franchises and if this mere fact, regardless of the terms of the franchises, gave the State the power to regulate interstate service, there would be very few cases in which the existence of such power could be denied. The statute of 1917, quoted in the petitioners' brief, was not brought

to the attention of the court below and is, in any event, immaterial. There is no evidence that the Narragansett Company has exercised the rights conferred by this statute. It seems obvious, moreover, that the fact that a corporation enjoys the right of eminent domain does not subject its interstate business to state regulation; if this were otherwise, the States could fix railroad rates *ad libitum*. The idea that, if the Narragansett Company continues to perform its contract with the respondent, its franchises may be forfeited is too fanciful for lengthy discussion. The Narragansett Company cannot be penalized by the State for doing something with which the State is forbidden by the federal constitution to interfere.

II.

EVEN IF THE RULING OF THE STATE COURT UPON THE QUESTION OF INTERSTATE COMMERCE HAD BEEN WRONG, THE RESULT WOULD HAVE BEEN THE SAME, BECAUSE THE ORDER OF THE PUBLIC UTILITIES COMMISSION WAS IN OTHER RESPECTS SUBJECT TO FATAL CONSTITUTIONAL OBJECTIONS.

(a) *If the Public Utilities Act applies to Service rendered to Customers in other States, it so discriminates against them as to deprive them of the equal Protection of the Laws.*

While the order of the Public Utilities Commission proceeds on the assumption that the respondent is subject to all the burdens of the statute, it is apparent that, being a foreign corporation, the respondent enjoys none of its benefits. Section 18 of the Public Utilities Act gives the right to invoke the power of the Commission

only to "any city or town council, any corporation or any twenty-five qualified voters." It is obvious that "any city or town council" includes only municipal agencies in Rhode Island and that, in like manner "qualified voters" means "voters qualified in Rhode Island." Theoretically, of course, the word "corporation" is broad enough to include a corporation organized and doing business anywhere, but the necessary inference from the context is that only corporations doing business in Rhode Island are intended.

Commonwealth v. Boston, 97 Mass. 555.

It follows that, if the act is construed as applicable to service rendered to customers in other States, it subjects such customers to its burdens but gives only residents of Rhode Island its benefits; nonresidents, therefore, are deprived of the equal protection of the laws, so that, as applied to them, the act is repugnant to the Fourteenth Amendment.

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U. S. 544.

Travis v. Yale & Towne Manuf. Co., 252 U. S. 60.

Southern Railway v. Greene, 216 U. S. 400.

(b) *The Respondent under the Order in Question is deprived of its Property without due Process of Law.*

The petitioners argue that the State may in the exercise of the police power set aside contracts between public utilities and individual customers when the public good demands. This doctrine is, of course, well established, but it is subject to the important qualification that the overriding of contracts solemnly entered into is an

extreme measure and that the mere fact that a contract turns out to be unprofitable to those furnishing the service is not a sufficient reason for setting it aside, especially when no customer is making complaint and when, as here, the absence of profit was foreseen at the time the contract was made (Record, pp. 136-137, 146-147, 255). In order to justify the impairing of the obligation of such a contract, it must be shown that, if the contract remains in force, the effect will be not simply to reduce the company's profits, but to prevent it from rendering adequate service to its other customers. The principle was stated as follows by Mr. Justice Sutherland in *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379 (at p. 383):—

"The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies, and, at the same time, conditions, its exercise."

This passage was quoted by Judge Brown as applicable to the present situation (295 Fed. Rep. at p. 901). He further said:—

"The finding that the contract was unprofitable *and therefore discriminatory . . .* is a non-sequitur."

* * * * *

"Before a contract can be interfered with under the police power, it must appear that the contract does in some manner affect adversely the welfare of the public.

"There is nothing in the records to show that the defendant brought to the notice of the Commission any evidence

that the company would be unable to perform its full duty to the community whose interest it is the function of the Commission to protect."

In the brief for the petitioners (p. 35) it is said with reference to this part of Judge Brown's opinion that from this it appears that the ground of his decision was "that there was no proper finding of facts after a hearing." If this means that, if the first attempt of the Commission to abrogate the contract had been based upon the same evidence as the second, Judge Brown would have held the action of the Commission justifiable, it is a manifest misconception. What the judge ruled in substance was that there must be something more than the remote detriment to the public theoretically resulting from the existence of an unprofitable contract to warrant the abrogation of such a contract, whereas the evidence upon which the order of January 21, 1925, purported to be based presented no suggestion whatever of real detriment to the public.

Such detriment, it is manifest, can arise only in two ways; either the enjoyment of the contract rate by the respondent may cause other customers to receive less favorable rates than they are entitled to or the Narragansett Company's earnings may be so reduced as to impair its ability to secure the capital needed in order to provide adequate service. There is not the slightest suggestion either in the findings of the Commission or in the evidence that either of these conditions obtains. It is not pretended that the Narragansett Company's rates to other customers are not eminently reasonable or that the service rendered them is in any way inadequate; as to its financial condition, it appears that its gross earnings have increased from \$2,566,000 in 1917 to \$6,600,000 in 1923; that for the year 1923 it had a net divisible income of \$1,595,848.94, and that, after paying

dividends at the rate of 8 per cent., there remained a surplus of \$293,392.94, also that for the first three months of 1924, after making provision for dividends at the same rate and notwithstanding a reduction in the charges for certain classes of service, there was a surplus of \$248,969.02 (Record, pp. 102-103, 123). Throughout the entire period since the making of the contract, the Narragansett Company has paid 8 per cent. dividends; its stock now sells substantially on a 6 per cent. basis (Record, p. 176). The difference between the Narragansett Company's income from service rendered the respondent under the contract rate and that under the rate fixed by the Commission is estimated at \$50,000 per year (Record, p. 86), which represents so small a proportion of the company's total income as to make preposterous the suggestion that the company's ability to serve its Rhode Island customers will be perceptibly affected if the contract is not set aside.

At the hearing before the Commission there were introduced certain tabulations purporting to show that a loss has resulted each year under the contract and that this loss will increase during the remainder of the contract period. It is not alleged, however, that the loss will endanger the dividend rate (Record, p. 102). Besides this, the question is as to whether the contract may properly be abrogated *now*; whatever the rights of the parties might be if the contract should hereafter become more onerous, it certainly cannot be set aside at this time because of conjectural difficulties in the future.

The order of the Commission has the effect of depriving the respondent of its property without due process of law for the further reason that, even if there had been evidence justifying the setting aside of the contract, the Commission was not on any theory warranted in

going further by way of increasing the rate than was absolutely necessary to relieve the supposed exigency. The present case, in other words, involves in reverse form the principle that rates duly established by the State cannot be pronounced too low simply because they yield a less profit than may seem fair from the standpoint of the utility or expedient from that of the public; they must be actually confiscatory before they can be interfered with.

Detroit & Mackinac Railway v. Railroad Commission, 203 Fed. Rep. 864; affirmed 235 U. S. 402.

So here, the rate cannot be fixed as if the contract did not exist and as if the only question was what rate would yield what is supposed to be a normal profit; a rate fixed by a valid contract can be raised only to such extent as is absolutely demanded by the public necessity, even though the rate as so raised may be less than might be deemed reasonable on general principles. The Commission, however, made no finding on this vital point. The contention of the Narragansett Company was that it was entitled to a profit of 8 per cent. on its business generally and that the rate for service rendered to the respondent should be so raised that the return on the investment devoted to the furnishing of this service would reach that figure (Record, pp. 57, 229). It was virtually conceded, however, that only about \$23,700 of additional income was needed annually to offset the increase in generating cost since the contract was made, yet a rate calculated to bring in each year at least \$50,000 more than the old rate was asked for. The Commission in substance adopted this contention, as appears from the following passage in its decision (Record, p. 419):—

“The Commission find that under present conditions a return of approximately 8% on the value of the invest-

ment devoted to the furnishing of service to the Attleboro Company is a reasonable return and that considering all the evidence submitted, service by the Narragansett Company under schedule R. I. P. U. C. No. 125 will yield to the Narragansett Company approximately 8% on the investment devoted by the Narragansett Company to the furnishing of such service."

The Commission, in other words, went about the fixing of the rate exactly as if the contract did not exist. It follows that, even if there had been justification for setting the contract aside, the rate actually fixed would still subject the respondent to an unwarrantable burden and deprive it of its property without due process of law.

(c) *The Contract between the Respondent and the Narragansett Company cannot be set aside without impairing the Obligation of the Contract between the Respondent and the State of Rhode Island implied in the Approval of the original Rate.*

It appears from the petitioners' brief (pp. 31-32) that the respondent's position on this branch of the case has been misunderstood. The respondent has never contended that, if the order of the Commission were valid in other respects, it could be attacked as impairing the obligation of the contract between the respondent and the Narragansett Company. The contract as to which this constitutional provision is invoked is the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract and the rule of law relied on is the elementary one that a contract entered into by the State with respect to the rates to be charged by a public utility is no less binding than other contracts. Unless the right to fix different rates is expressly or impliedly reserved, the

State cannot, without impairing the obligation of the contract, establish inconsistent schedules.

St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352.

Southern Iowa Electric Company v. Chariton, 255 U. S. 539.

Cleveland v. Cleveland City Railway, 194 U. S. 517.

Detroit v. Detroit Citizens' Street Railway, 184 U. S. 368.

In the present case, the 20-year term was as much an essential part of the rate embodied in the Schedule R. I. P. U. C. 68 as the price to be charged. The petitioners are mistaken when they say on page 28 of their brief that "the order provided that the said rate should be as shown in Schedule No. 68 of the Narragansett Company," but "avoided any mention of the period of time for which the contract rate was to be effective." The schedule expressly recited "Term of contract twenty (20) years and thereafter unless discontinued by either party" (Record, p. 276). Hence the approval of the contract rate by the Commission,—assuming that the Commission had jurisdiction in the matter at all,—necessarily imported a finding that it was consistent with the public interest that the Narragansett Company be permitted to take upon itself the obvious risk that, as a result of unforeseen conditions, the rate might prove unremunerative. Hence the State, by the approval of the rate, bound itself not to take inconsistent action during the twenty-year period. It is not competent for the State, under color of exercising the police power, to reverse the finding made by its officers when the rate was first submitted and in effect to say that they made a mistake, so that their adjudication may now be treated as nugatory, especially after this adjudication has been

acted upon and the position of the respondent radically changed in reliance upon it; the State must be deemed to have entered into a contract not to disturb the rate for the period specified.

New York & Queens Gas Co. v. Prendergast,
1 Fed. Rep. (2d), 351.

State v. Marshall, 98 Ohio St. 467.

III.

THE PETITIONERS' CONTENTION THAT THE NARRAGANSETT COMPANY HAD BY ITS CHARTER POWER TO CONTRACT ONLY SUBJECT TO REGULATION BY THE PUBLIC UTILITIES COMMISSION PRESENTS NO FEDERAL QUESTION.

The suggestion that the Narragansett Company's charter should be construed as limiting its power to contract was not advanced before the Supreme Court of Rhode Island and cannot now be made for the first time.

Wilson v. McNamee, 102 U. S. 572, 574.
Rogers v. Ritter, 12 Wall. 317, 320.

Apart from this the interpretation of the charter is exclusively a question of state law. The court below evidently proceeded on the assumption that the *capacity* of the Narragansett Company to make contracts like that in question was as ample as the *capacity* of an individual to make similar contracts. It is, of course, true that corporations and individuals alike are subject to the police power, but this does not affect the *capacity* of corporations to contract any more than it affects the *capacity* of individuals. If the state court should have decided that the Narragansett Company had no corporate power to make a rate contract not susceptible of abro-

gation by the Public Utilities Commission, the error cannot be corrected here.

Munday v. Wisconsin Trust Co., 252 U. S. 499.
Cusack Co. v. Chicago, 242 U. S. 526.

Even if the question were open in this court, however, there would be no merit in the respondent's contention. The Narragansett Company's charter is in the broadest terms and contains nothing to suggest that the State reserves any power of regulation, except as such a reservation may be implied in the charter of every public service corporation. That this implied reservation,—whatever it may amount to,—does not affect the situation is demonstrated by the fact that, if the petitioners' contention were sound, the charges for interstate service rendered by every domestic corporation would be subject to regulation by the State *ad libitum*, with the result that a great part of the cases involving the power of the States to deal with interstate commerce would necessarily have been decided the other way. It has never been imagined, for example, that the rates for interstate service rendered by a domestic railroad company were subject to state regulation any more than the rates for such service rendered by a foreign corporation, yet the distinction must exist if the petitioners' argument is well grounded.

IV.

THE STATE COURT HAS NEVER DECIDED THAT THE PUBLIC UTILITIES ACT, ACCORDING TO ITS TRUE CONSTRUCTION, GIVES THE COMMISSION JURISDICTION TO MAKE AN ORDER LIKE THAT IN QUESTION, EVEN IF THE ACT WOULD NOT BE UNCONSTITUTIONAL IF SO CONSTRUED.

The petitioners in their brief (p. 36) assert that "there is no question as to the jurisdiction of the Commission to make the order." This assertion is based on a few words taken out of their context in the opinion of the Supreme Court of Rhode Island. The entire sentence from which these words are extracted is as follows (Record, p. 442):—

"The Attleboro Company challenges this order and claims it is unauthorized and void on various grounds; the principal and decisive objection, in our judgment, is that said order is an improper interference by the State with interstate commerce."

When this sentence is read in connection with the points set up in the respondent's claim of appeal, it is patent that the court is simply stating in a summary way the respondent's basic argument, *i.e.*, that the whole subject matter of the order was outside the State's power of regulation, and was not assuming to decide adversely to the respondent as to its other contentions. If upon this fundamental ground the respondent was entitled to succeed in any event, discussion of the various preliminary objections became superfluous. Had it become necessary to determine whether, as a matter of statutory construction, the order was within the Commission's jurisdiction, the court might well have reversed the order on that ground.

Section 2 of the act purports to extend the power of the Commission to the regulation of every corporation,

etc., owning or operating "any railroad or street railway within this state" and to every corporation, etc., owning or operating "any plant . . . within this state . . . for the production . . . of gas, electricity," etc. It is apparent that, in order to escape fatal constitutional difficulties, the broad language as to railroads and street railways must be taken with the implied qualification that interstate service is not within the purview of the act. Even assuming that the clause as to gas, electricity, etc., would not necessarily be so construed if it stood alone, the significant fact is that this clause appears as a part of the same sentence as the clause respecting railroads and street railways and is substantially identical in frame. When the legislature used in the clause as to railroads and street railways language having a well-defined meaning as applied to those subjects and immediately thereafter in the same sentence used similar language with respect to gas and electricity, the presumption is that the words were used in the same sense in the later clause as in the earlier.

Gillen's Case, 215 Mass. 96, 98.

As has been pointed out above, moreover, the right to invoke the power of the Commission is limited by § 18 of the act to residents of Rhode Island. Even if this discrimination between residents and nonresidents did not affect the constitutionality of the act, there would still be a presumption that the legislature did not intend to regulate transactions with nonresidents. Very explicit language would be necessary to warrant the conclusion that such an unfair discrimination was intended, even if constitutionally permissible. On the other hand, it is not difficult to infer that the legislature, perceiving the complications which would at once be encountered if it were attempted to regulate interstate transactions, preferred to leave such transactions outside the scope of the act.

V.

IF THE ORDER OF THE COMMISSION HAD NOT BEEN OPEN TO JURISDICTIONAL OBJECTIONS, IT MUST NEVERTHELESS HAVE BEEN REVERSED, BECAUSE OPPOSED TO THE GREAT WEIGHT OF THE EVIDENCE.

The petitioners do not contest the respondent's right under §§ 34, 36 and 37 of the Public Utilities Act to have the Commission's findings of fact reviewed substantially as upon an appeal in equity.

Ohio Valley Water Co. v. Ben Avon Borough,
253 U. S. 287.

Oregon Railroad & Navigation Co. v. Fairchild,
224 U. S. 510.

Rivelli v. Providence Gas Co., 44 R. I. 76.

If it became necessary to go into this phase of the case a most searching examination of this voluminous record would be called for. Without repeating at the present time the extended argument which was submitted to the Supreme Court of Rhode Island upon this point, it may be enough to say that the respondent believes that the Commission's findings of fact were grossly erroneous and is confident that this can be demonstrated to the satisfaction of any impartial tribunal. Moreover, the rate actually fixed would still be most unreasonable, even if the propriety of making *some* increase were established; the rate which the Commission assumed to fix yields, on the Narragansett Company's own figures, much more than is needed to offset the supposed increase in plant and operating costs.

Before the petitioners can justly invoke the extraordinary remedy of certiorari, they should make it appear that there is at least a fair probability that, if the decree of the Supreme Court of Rhode Island were reversed

and the case remanded for a hearing upon these questions of fact, the respondent would not prevail. Their argument on this point, however, amounts to little more than an assertion that the Commission was right. For this reason, if for no other, the present petition should be denied.

ROBERT G. DODGE.
ARCHIBALD C. MATTESON.
HAROLD S. DAVIS.

APPENDIX

RHODE ISLAND LAWS OF MAY, 1884, PAGE 29,—
“AN ACT TO INCORPORATE THE NARRAGAN-
SETT ELECTRIC LIGHTING COMPANY”

(Passed May 29, 1884.)

It is enacted by the General Assembly as follows:

SECTION 1. Isaac M. Potter, James G. Markland, Samuel W. Peckham, Henry C. Bradford, Frederick I. Marcy, Martin V. Brady, Nathaniel T. Spink and John B. Allen, their associates, successors and assigns, are hereby constituted a corporation by the name of “The Narragansett Electric Lighting Company,” for the purpose of prosecuting a general electric lighting, heating and power business; that is to say, the business of producing, using and supplying light, heat and power generated by means of electricity; and for the transacting of other business connected therewith; with all the powers and privileges, and subject to all the duties and liabilities set forth in chapters 152 and 155 of the Public Statutes, and in the statutes in amendment thereof, and in addition thereto.

SEC. 2. The capital stock of said corporation shall not exceed one hundred and fifty thousand dollars, to be fixed in amount from time to time, and to be divided into such number of shares, and the par value of each share to be fixed at such amount as the corporation may by vote determine; and said shares shall be non-assessable.

SEC. 3. The stock or shares of every stockholder shall be pledged and liable to the corporation for all debts and demands due and owing from such stockholder to the corporation, and whether overdue or due at a future day; and said stock or shares may be sold for the payment of such debts and demands in such manner as the by-laws of said corporation may prescribe; and in case the proceeds of such sale shall be insufficient to discharge such debts or demands, with the incidental expenses of sale, the corporation may have their action against the debtor for the balance due.

SEC. 4. Said corporation, with the consent of the town and

city councils where wires and conductors for electricity are to be put up, laid, used and maintained, may put up, lay, use and maintain wires and conductors for electricity, under and over highways, streets and sidewalks, and, with the written consent of the owners thereof, upon and over buildings, subject to such ordinances, regulations and orders of the city and town councils of the cities or towns where such wires or conductors shall be maintained, as are or may be enacted with respect to such wires and conductors; and said wires and conductors located above any highway shall be removed whenever required by general law or by order of such city or town council, after thirty days notice in writing shall be given to said corporation; and said corporation shall be entitled to no compensation on account of such removal.

SEC. 5. There shall be an annual meeting of the stockholders, in the city of Providence, at such time as the by-laws shall prescribe, for the choice of officers, and for such other business as may come before them.

SEC. 6. Said corporation shall have an office or place of business in the city of Providence.

SEC. 7. This act shall take effect from and after its passage.

**EXTRACTS FROM THE PUBLIC UTILITIES ACT OF RHODE ISLAND
(CHAPTER 795 OF THE PUBLIC LAWS OF 1912, AS AMENDED
BY CHAPTER 1651 OF THE PUBLIC LAWS OF 1918).**

SEC. 34. Any public utility or any complainant, aggrieved by any order of the commission fixing any rate, toll, charge, joint rate or rates, or any order fixing any regulation, measurement, practice, act or service, may appeal to the supreme court for a reversal of such order on the ground that the rate, toll, charge, joint rate or rates, fixed in the order are unlawful or unreasonable, or that any such regulation, measurement, practice, act or service fixed in such order is unlawful or unreasonable.

The party prosecuting the appeal shall file a petition with the clerk of the supreme court within seven days from the

service of the order appealed from, and such petition shall set forth the grounds upon which it is claimed that the order appealed from is unlawful or unreasonable. Thereupon the clerk of the supreme court shall issue citation to all parties in interest, including the commission, returnable at any time within thirty days from date of its issue in the discretion of the court, and the court shall hear and determine, as soon as may be, the matter, and either sustain or reverse the order appealed from. The court is hereby given authority to regulate the practice and procedure in such appeal by such rules as it may see fit to make: PROVIDED, that all such appeals shall have precedence over other civil cases in the supreme court.

SEC. 36. At any hearing in the course of such an appeal a transcript of the testimony before the commission in such case, duly certified by the stenographer taking the same, and allowed by one of the commissioners, shall be admitted as testimony.

SEC. 37. If, upon the hearing of the appeal, newly discovered evidence shall be introduced by the appellant which is found by the court to be of such a character, and of sufficient importance, to warrant a reconsideration of the order appealed from, the court, before proceeding to render a final decision, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceeding in said action for sixty days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may alter, amend or rescind the order appealed from, and shall report its action thereon to the court within fifty days from the receipt of such evidence. If the commission shall rescind the order appealed from, the appeal shall be dismissed. If it shall alter, or amend the same, such altered or amended order shall take the place of the original order appealed from and the court shall render its decree thereon as though made by the commission in the first instance. If the original order shall not be altered, amended or rescinded

by the commission, the final decision shall be rendered upon such original order and the final decree entered in conformity therewith.

SEC. 42. The provisions of Sections thirty-nine, forty and forty-one of this act shall be subject to the following exceptions:

(a) A public utility may issue or give free transportation or service to its employees and their families, its officers, agents, surgeons, physicians and attorneys-at-law, and to the officers, agents, and employees, and their families of any other public utility.

(b) With the approval of the commission any public utility may give free transportation or service, upon such conditions as such public utility may impose, or grant special rates therefor to the state, to any town or city, or to any water or fire district, and to the officers thereof, for public purposes, and also to any special class or classes of persons, not otherwise referred to in this section, in cases where the same shall seem to the commission just and reasonable, or required in the interests of the public, and not unjustly discriminatory.

SEC. 48. *(As amended by Chapter 1651, Pub. Laws, 1918.)* Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. A copy of so much of said schedules as the commission shall deem necessary for the use of the public shall be printed in plain type, or typewritten, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public in such form and place as to be readily accessible and conveniently inspected, and as the commission may order. The commission may determine and prescribe the form in which the schedules, required by this section to be kept open

to public inspection, shall be prepared and arranged, provided, that with respect to public utilities subject to the federal "Act to Regulate Commerce," so-called, the form of such schedules shall be that from time to time prescribed by the Interstate Commerce Commission. No change shall be made in the rates, tolls, and charges which have been filed and published by any public utility in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rates, tolls or charges will go into effect. Whenever the commission receives such notice of any change or changes proposed to be made in any schedule filed under the provisions of this section, it shall have power either upon complaint as specified in Section eighteen hereof, or upon its own motion and upon such notice as provided for in Section twenty hereof to hold a public hearing and make investigation as to the propriety of such proposed change or changes. After notice of any such investigation, the commission shall have power by any order served upon the public utility affected to suspend the taking effect of such change or changes pending the decision thereon, but not for a longer period than three months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation either upon complaint as specified in Section eighteen hereof or upon its own motion, the commission may make such order in reference to any proposed rate, toll or charge as may be proper. At any such hearing involving any proposed increase in any rate, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the public utility: PROVIDED, that the commission may, in its discretion and for good cause shown, allow changes within less time than required by the notice herein specified, and without holding the hearing and investigation herein provided for or modify the requirements of this section with respect to filing and publishing tariffs either in the particular instance or by general order applicable to special or particular circumstances or conditions.

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Supreme Court of the United States
OCTOBER TERM, 1926.

PUBLIC UTILITIES COMMISSION OF RHODE
ISLAND ET AL., *Petitioners*,

v.

ATTLEBORO STEAM & ELECTRIC COMPANY,
Respondent.

BRIEF FOR THE RESPONDENT.

On July 22, 1925, the Supreme Court of Rhode Island entered a decree sustaining an appeal of the present respondent from an order made by the Public Utilities Commission of Rhode Island which purported to set aside a contract between the respondent and the Narragansett Electric Lighting Company (hereinafter called "the Narragansett Company") fixing the rate for electrical energy supplied by the Narragansett Company to the respondent and to establish a much higher rate for the same service. In an opinion reported in 46 R. I. 496 and set out in the present record at pages 438 to 447 the court held in substance that the Public Utilities Commission had no jurisdiction to interfere with the contract and that its order was illegal and void.

On October 26, 1925, this court granted a writ of certiorari to review the decision of the state court (269

U. S. 546). Several federal questions were argued before the state court and no contention is made by the respondent as to the jurisdiction of this court to review the decision,—so far as concerns these questions,—upon certiorari. It is submitted, however, that the decision of the state court must be affirmed both for the reason assigned in the opinion and for other reasons not discussed by the court below because immaterial in view of its conclusion on the point dealt with.

STATEMENT OF THE CASE.

The facts, so far as now pertinent, may be summarized as follows:—

The respondent (which is a Massachusetts corporation) has been for many years engaged in supplying electricity for private and public consumption throughout the city of Attleboro, Massachusetts. The Narragansett Company was incorporated on May 29, 1884, by a special act of the General Assembly of Rhode Island, the first section of which is as follows and which is printed in full in the appendix to this brief:—

"Isaae M. Potter, James G. Markland, Samuel W. Peckham, Henry C. Bradford, Frederick L. Marcy, Martin V. Brady, Nathaniel T. Spink and John B. Allen, their associates, successors and assigns, are hereby constituted a corporation by the name of 'The Narragansett Electric Lighting Company,' for the purpose of prosecuting a general electric lighting, heating and power business; that is to say, the business of producing, using and supplying light, heat and power generated by means of electricity; and for the transacting of other business connected therewith; with all the powers and privileges, and subject to all the duties and liabilities set forth in chapters 152 and 153 of the Public Statutes, and in the Statutes in amendment thereof, and in addition thereto."

The chapters in the Public Statutes of Rhode Island, 1882, thus referred to are entitled "Provisions respecting corporations in general" and "Of manufacturing corporations" respectively and it is not alleged by the petitioners that either of them contains anything purporting to reserve to the State any power to regulate rates. Ever since its incorporation the Narragansett Company has maintained in Providence an electric generating plant and has supplied electricity in Providence and its vicinity.

The Public Utilities Commission was established by Chapter 795 of the Public Laws of 1912 of Rhode Island (known as the "Public Utilities Act" and now constituting Chapter 253 of the General Laws of Rhode Island, 1923). The parts of the act material to the present case are §§ 1, 2, 3, 18, 20, 21, 26, 27, 28, 33, 34, 36, 37, 39, 40, 42, and 48, which are printed at the close of this brief.

Under date of May 8, 1917, the two companies entered into a contract whereby the Narragansett Company undertook to sell and deliver to the respondent during the term of twenty years from the date of the contract all the electrical energy then or at any time thereafter used by it and supplied to its customers in Attleboro, payment to be made at a rate specified in the contract and all such electrical energy to be delivered at the state line between the town of East Providence, Rhode Island, and the town of Seekonk, Massachusetts (Record, p. 256). The contract was not sought by the respondent, but was solicited by the Narragansett Company (Record, pp. 117, 136, 401). On May 14, 1917, the Narragansett Company filed with the Commission a schedule (designated as R. I. P. U. C. No. 68) setting out the rate specified in the contract and requested that the same be approved as a special

rate under § 42 of the Public Utilities Act (Record, p. 253). This schedule, which is reproduced in full on page 275 of the Record, contains the following item:—

"TERM OF CONTRACT"

"Twenty (20) years and thereafter unless discontinued by either party."

On May 23, 1917, the Commission entered an order reciting that the Narragansett Company was "authorized to grant a special resale rate to the Attleboro Steam & Electric Company at the state line between Rhode Island and Massachusetts, said rate to be as shown in the tariff of said Narragansett Electric Lighting Company, R. I. P. U. C. No. 68" (Record, p. 390).

The two companies duly entered upon the performance of the contract and electricity has been supplied in accordance with its terms ever since, the respondent's plant having been dismantled (Record, p. 117). The Narragansett Company, however, presently became dissatisfied with the contract and on April 6, 1921, filed with the Commission a schedule entitled R. I. P. U. C. 101, which purported to supersede the rate specified in the contract and to establish a rate materially higher (Record, p. 391). On April 27, 1921, the Commission, after an *ex parte* hearing, made an order purporting to waive as to the proposed rate the requirements of § 48 of the Public Utilities Act respecting notice to the Commission and to the public (Record, p. 394). The Narragansett Company demanded that the respondent pay at the increased rate for all electrical energy furnished thereafter and threatened to cut off the supply if this demand were not complied with. The Attleboro Company thereupon brought in the United States District Court a suit to restrain the Narragansett Company from carrying out this threat.

This suit was heard by Judge Brown, who rendered an opinion (which is made a part of the record in the present case, pp. 1-22) leaving open the question whether the Commission had power after a formal public hearing to establish a rate inconsistent with that specified in the contract, but holding that, in any view of the case, the mere filing of a new rate by the Narragansett Company and waiving of the statutory notice by the Commission was not enough to relieve the Narragansett Company from its obligations under the contract.

Attleboro Steam & Electric Co. v. Narragansett Electric Lighting Co., 295 Fed. Rep. 895.

On April 4, 1924, there was entered in accordance with this opinion a final decree enjoining the Narragansett Company as prayed in the bill with a proviso to the effect that nothing contained in the decree should be construed as affecting the rights of the parties in case the Commission should assume after notice and a formal public hearing to establish a rate inconsistent with that specified in the contract.

On May 7, 1924, the Narragansett Company filed with the Commission a schedule designated as R. I. P. U. C. 125, setting out a rate applicable to all service rendered by the Narragansett Company to the respondent, which rate is materially higher than that specified in the contract and is otherwise inconsistent with the contract and with the provisions of the schedule R. I. P. U. C. 68 (Record, p. 29). On the same day the Commission at the solicitation of the Narragansett Company (Record, p. 23) notified the respondent that on its own motion it ordered "an investigation and public hearing upon the question of whether the exist-

ing rates, tolls and charges of the Narragansett Electric Lighting Company now charged to the Attleboro Steam & Electric Company or those proposed to be charged to said company and other electric lighting companies under said rate schedule R. I. P. U. C. No. 125 cancelling R. I. P. U. C. No. 68 and No. 101 are unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise in violation of any of the provisions of the Public Utilities Act of the State of Rhode Island and otherwise upon the question as to the propriety of the proposed change or changes embodied in said Schedule No. 125," the hearing to be held on May 26, 1924. The reference in this notice to the rates charged to "other electric lighting companies under said rate schedule R. I. P. U. C. No. 125" was nugatory, because the respondent was avowedly the only customer affected by that schedule (Record, pp. 94, 96, 385). Upon the opening of the hearing, the respondent appeared by its attorneys and represented that the Commission had no jurisdiction to hold the proposed investigation or to establish the rate specified in the schedule R. I. P. U. C. 125 in substitution for that specified in the contract and in the schedule R. I. P. U. C. 68 or to make any order inconsistent with the terms of the contract for the reason, among others, that any action so taken would be repugnant to the Constitution of the United States (Record, pp. 51-54). The Commission overruled all these jurisdictional objections and assumed to proceed with the hearing substantially as if the service in question was strictly intrastate and as if the only question was what rate for service rendered the respondent would yield the Narragansett Company the profit to which it conceived itself to be entitled upon its business generally.

On January 21, 1925, the Commission filed an opinion which concluded as follows (Record, p. 420) :—

“It is therefore ORDERED:

“(1) That the rates contained in Schedule R. I. P. U. C. No. 68 of the Narragansett Electric Lighting Company, are unjust, unreasonable, insufficient and unjustly discriminatory and preferential and otherwise in violation of the Public Utilities Act, and

“(2) That the rates contained in Schedule R. I. P. U. C. No. 125 of the Narragansett Electric Lighting Company are just and reasonable, and may be allowed to become effective on all electricity delivered on and after February 1, 1925.”

The respondent, being uncertain as to whether under the terms of the Public Utilities Act it had a right to appeal from the order of the Commission, filed simultaneously in the Supreme Court of Rhode Island a claim of appeal and a petition for certiorari. The grounds of appeal (Record, pp. 422-426) may be summarized as follows:—

- (a) The Commission acted without jurisdiction;
- (b) There was no evidence to justify the setting aside of the contract rate and the establishing of the new rate;
- (c) The Public Utilities Act, if construed as purporting to give the Commission jurisdiction to make the order in question, is repugnant to the Constitution of the United States—
 - (i) As improperly interfering with interstate commerce;
 - (ii) As depriving the respondent of the equal protection of the laws;
 - (iii) As depriving the respondent of its property without due process of law;

- (iv) As impairing the obligation of the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract;
- (d) If the Public Utilities Act be so construed, the Commission's order is repugnant to the Constitution of the United States for similar reasons;
- (e) The order of the Commission, even if not invalid as matter of law, is plainly wrong as opposed to the great weight of the evidence.

The Supreme Court of Rhode Island, after deciding that the respondent's remedy was by appeal, proceeded, without considering the many other points argued, to deal with the basic question whether it was competent for the State to fix the rates to be charged for an interstate service like that called for by the contract and came to the conclusion that it was not (Record, pp. 438-477). A final decree reversing the order of the Commission and directing that the proceeding be dismissed was accordingly entered (Record, p. 448).

ARGUMENT.

The respondent submits that the decree of the Supreme Court of Rhode Island should be affirmed for the following reasons:—

I. The ruling upon the question of interstate commerce was right.

II. Wholly apart from the question of interstate commerce, the decree must be affirmed upon several grounds.

1. The order of the Public Utilities Commission was in other respects subject to fatal constitutional objections.

(a) If the Public Utilities Act applies to service rendered to customers in other States, it so discriminates against them as to deprive them of the equal protection of the laws.

(b) The respondent under the order in question is deprived of its property without due process of law.

(c) The contract between the respondent and the Narragansett Company cannot be set aside without impairing the obligation of the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract rate for the full term of twenty years.

2. The Public Utilities Act according to its true construction gives the Commission no jurisdiction to make an order like that in question, even if the act would not be unconstitutional if so construed.

3. If the order of the Commission had not been open to jurisdictional objections, it must nevertheless have been reversed, because opposed to the great weight of the evidence.

I.

The Ruling of the State Court upon the Question of Interstate Commerce was right.

The petitioners concede that the transmission of electricity from one State to another constitutes interstate commerce. This being so, the only question is whether there is anything to take the case out of the general rule that rates for interstate service rendered by a public utility cannot be fixed by state action. The petitioners are, of course, obliged to recognize the close parallel between the facts of this case and those in *Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298. In the attempt to distinguish that case they rely upon two classes of cases, neither of which, it is submitted, has any bearing upon the present situation.

One of these classes relates to state laws establishing in general terms police regulations applicable to interstate and intrastate commerce alike. It has often been held that, while Congress may legislate on these subjects because such legislation is incidental to the power to regulate interstate commerce and while a federal statute so enacted is supreme, state laws dealing with matters of this kind do not constitute regulations of interstate commerce and so are valid in the absence of action by Congress. The principle was stated as follows in a leading case involving a state statute prescribing the qualifications of locomotive engineers:—

“The provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they are parts of that body of the local law which . . . properly governs the relation

between carriers of passengers and merchandise and the public who employ them."

Smith v. Alabama, 124 U. S. 465 (at p. 480).

This doctrine is irrelevant to the case at bar, because it was recognized long before there was any federal legislation on the subject that a statute or order prescribing the rates to be charged for interstate service is primarily and necessarily a regulation of interstate commerce.

Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S. 557.

The other class of cases relied on by the petitioners deals with those few peculiar situations in which the business in question, although constituting interstate commerce, is so highly localized that it is regarded as consistent with the interstate commerce clause for the States to regulate such business in the absence of action by Congress.

Pennsylvania Gas Co. v. New York, 252 U. S. 23, cited by the petitioners, is a case of this kind. The dissimilarity between such a case and the present is patent; in it the product, after being brought into the State, was broken up and distributed at retail and it was this retail distribution which the State was held competent to regulate. In other words, the situation was the same as would arise if Massachusetts should undertake to fix the rates at which electricity should be supplied by the respondent to its miscellaneous customers in Attleboro; the fact that the electric current came from outside the State would not affect the power of Massachusetts to fix rates unless Congress had enacted inconsistent legislation.

Public Utilities Commission v. Landon, 249 U. S. 236,

also cited by the petitioners, is yet more irrelevant; the decision went on the ground that, in view of the manner in which the gas in question was distributed, the service must be regarded as wholly intrastate.

In the case at bar the service is not the distribution in one State of something produced in another State; the essence of the contract is the transmission of the product across the state line. The service is, moreover, strictly wholesale, the entire product being transmitted to a single recipient, which performs independently the local service of distribution. Under these circumstances, the Supreme Court of Rhode Island was clearly right in treating the following passage from the opinion in *Missouri v. Kansas Natural Gas Co.* (265 U. S. at p. 309) as controlling:—

"In both cases [*Public Utilities Commission v. Landon* and *Pennsylvania Gas Co. v. New York*] the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case*. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The para-

mount interest is not local but national, admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned."

The case of *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders*, 234 U. S. 317, is much stressed by the petitioners. With regard to that case it is to be noted in the first place that traffic over the ferry in question moved both ways and the decision turned largely on the fact that, if New Jersey were admitted to have the right to regulate the rate charged for transit from New Jersey to New York, there must be a corresponding right on the part of New York to regulate the rate charged in the other direction, so that neither State had any advantage over the other. If the transmission in the case at bar were sometimes one way and sometimes the other, as would be true of a telephone line, for example, the cases would be similar in this respect. As it is, however, the transmission is all in one direction, so that, if the petitioners are right, the result is that Rhode Island has the sole power to fix the rates to be paid by citizens of Massachusetts for an interstate service and this power, it should not be forgotten, is a legislative power which is not necessarily exerted through a commission acting quasi-judicially, but may be exercised by direct enactments based on considerations altogether foreign to the interests of the Massachusetts consumers. It is unnecessary, however, to enlarge upon these details, because it is apparent from the opinion in the *Port Richmond* case that the *ratio decidendi* was the fact that ferries, for historical reasons, must be deemed *sui generis* as regards the application of the interstate

commerce clause and that, even with respect to ferries, the exception to the general rule is very limited.

St. Clair County v. Interstate Transfer Co.,
192 U. S. 454.

The considerations which led the court to conclude that the Constitution was not intended to take away the power of the States to regulate ferries,—many of which were, of course, in existence long before the Constitution was adopted,—have no application to modern instruments of commerce like railroads and transmission lines. For example, a railroad may be imagined with only two stations, one in New York and one in New Jersey; can it be supposed that the States, even in the absence of federal legislation, would have any greater power to regulate the rates than as if there were three or four stations on either side of the line, in which case no one would dream that any power of regulation existed?

Corington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204.

There is, in fact, no such rule as the petitioners seem to assert, *i.e.*, that, if the movement of interstate commerce is over a comparatively short course and between points near the state line, the right of the States to impose regulations is greater than when the movement is more extended and between points more remote. The recent decisions as to the right to regulate the interstate movement of automobiles sufficiently dispose of any such notion.

Buck v. Kuykendall, 267 U. S. 307.

George W. Bush & Sons Co. v. Maloy, 267 U. S. 317.

The petitioners further contend that, if Rhode Island cannot regulate the rates to be charged by the Narragansett Company for interstate service, the power to fix the rates charged to local consumers is to a certain extent restricted. That, of course, is true, but it is of no consequence, because the supposed difficulty is no different from that which always obtains when a public utility is rendering both intrastate and interstate service. The argument applies equally to railroad rates, for example, yet no one would pretend that it was of any force with regard to such rates.

Much of the petitioners' brief is devoted to enlarging upon the hardship which it is supposed may result to the Narragansett Company's Rhode Island customers if there is no tribunal competent to regulate the rates charged by it for interstate service. The answer to this argument, if one be needed, is found in the language used by the court in *Lemke v. Farmers' Grain Co.*, 258 U. S. 50 (at p. 60) :—

"It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control."

The passage which the petitioners on page 25 of their brief quote in this connection from Judge Brown's opinion (295 Fed. Rep. at p. 897) is of no significance, not only because it is a mere dictum, but because it antedates the decision in *Missouri v. Kansas*

Natural Gas Co.; the judge would doubtless have expressed himself differently if he had had that decision before him.

Another contention made by the petitioners is that the interstate service is only a small part of the service rendered by the Narragansett Company and that therefore the regulation of the interstate business should be deemed indirect and incidental. This argument is hardly consistent with the petitioners' other positions; if the interstate service is insignificant as compared with the whole service performed by the Narragansett Company, no hardship can result to Rhode Island consumers if the interstate business remains unregulated. Apart from this, however, the unsoundness of the contention is obvious. It is difficult to conceive of anything constituting a more direct regulation of interstate service than an order prescribing the rate at which it shall be performed. This is forcefully pointed out by the Supreme Court of Rhode Island in the case at bar (Record, pp. 446-447) :—

"The intrastate and interstate business of the Narragansett Company can be segregated. This separation has actually been made by that company and the Commission in establishing a basis for the proposed new rate. The effect of the action of the Commission was direct on interstate commerce and incidental on local and state commerce. Such being the case there is no difference in principle because of the amount of interstate commerce involved, whether it is much or little, at wholesale or retail. The purpose of the state action is immaterial if the result is to impose a direct burden on interstate commerce."

The petitioners' contention may be tested by applying it to the case of a railroad whose main line is

wholly within one State but which has a branch line extending into another State. It will hardly be pretended that the right of the former State to regulate the rates to be charged on this branch line is affected by the fact that it happens to be a part of a system largely intrastate.

It is to be remembered in this connection, moreover, that the order now in question is not like a speed law, for example, which applies to all classes of traffic alike, but is avowedly aimed solely at the respondent and will not affect any other consumer (Record, pp. 94, 96, 385). Such an order stands no better than as if it were limited in terms to service rendered to the particular customer intended to be affected.

Guinn v. United States, 238 U. S. 347.

State v. Jones, 66 Ohio St. 453.

People v. Albertson, 55 N. Y. 50.

Hence it is unnecessary to consider what the rule would be if the respondent were only one of many customers affected by the order and if the others were all in Rhode Island.

The petitioners on page 30 of their brief say that "the rate here regulated was for the sale within the State of a commodity produced within the State, as distinguished from a rate for transportation." This statement is inaccurate in that the electric current is delivered at the state line, so that, in so far as the transaction embodies the elements of a sale, it is like a case in which a seller stands on one side of the state line and hands the article in question across to a buyer standing on the other side. That the seller's State, in

such a situation, cannot regulate the price at which the sale shall be made seems too plain for argument.

Leisy v. Hardin, 135 U. S. 100.

Lemke v. Farmers' Grain Co., 258 U. S. 50.

Shafer v. Farmers' Grain Co., 268 U. S. 189.

In *Missouri v. Kansas Natural Gas Co.*, the court said (265 U. S. at p. 308) :—

“The sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein.”

Again, in *People's Natural Gas Co. v. Public Service Commission*, [1925-6] U. S. Adv. Ops. 468, it appeared that natural gas produced in West Virginia was delivered at the Pennsylvania line through a registering meter to a Pennsylvania corporation and by it transmitted to consumers in the latter State. The court said (at p. 469) :—

“As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and

title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business."

The petitioners would, however, be in no better position if the current were delivered in Rhode Island. In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, the court said (at p. 291):—

"In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

The fact that the current is generated in Rhode Island is likewise immaterial. When the commodity is a natural product and the sale of it may deplete the natural resources of the State, the argument in favor of the right to regulate such sale is exceedingly plausible. This court, however, has refused to recognize any such right even in cases of that kind.

West v. Kansas Natural Gas Co., 221 U. S. 229.

United Fuel Gas Company v. Hallanan, 257 U. S. 277.

Pennsylvania v. West Virginia, 262 U. S. 553.

In the case last cited the court said (at p. 596):—

"Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is

a regulation of interstate commerce,—a prohibited interference.”

Similarly, in *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, and *Lemke v. Farmers' Grain Co.*, 258 U. S. 50, the fact that the wheat in question was grown in the State which attempted to regulate the sale was treated as irrelevant.

A final point urged by the respondents is that the Narragansett Company is operating under franchises granted by the State whose power to regulate its rates is in question, relying on the concluding words of the opinion in *Missouri v. Kansas Natural Gas Co.* (265 U. S. at p. 310) :—

“That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Company is not so operating and is not made a party to these franchises by merely doing business with the franchise holders.”

The short answer to this argument is that the record discloses nothing as to the character of the franchises under which the Narragansett Company is rendering the service in question beyond the bare fact that its right to maintain wires in the highways, etc., has presumably been granted by the State or by some municipality. This alone is plainly immaterial. Almost every public utility operates under state or municipal franchises and if this mere fact, regardless of the terms of the franchises, gave the State the power to regulate interstate service, there would be very few cases in which the existence of such power could be denied.

The statute of 1917, quoted in the petitioners'

brief, was not brought to the attention of the court below and is, in any event, immaterial. There is no evidence that the Narragansett Company has exercised the rights conferred by this statute. It seems obvious, moreover, that the fact that a corporation enjoys the right of eminent domain does not subject its interstate business to state regulation; if this were otherwise, the States could fix railroad rates *ad libitum*.

Similar considerations apply to the statute of 1918, which is also quoted by the petitioners; the interstate commerce clause is surely not overridden by a mere grant of authority to absorb other companies,—an authority, which, so far as appears, has never been acted upon.

The recent decision of the Court of Appeals of the District of Columbia in *Galloway v. Bell*, 11 Fed. Rep. (2d) 558, is significant,—especially as a petition for certiorari was denied ([1925-6] U. S. Adv. Ops. 547),—inasmuch as the court placed upon the opinion in *Missouri v. Kansas Natural Gas Co.* the same interpretation as was given it by the Supreme Court of Rhode Island. The question was very similar to that now involved, *i.e.*, as to the power of the Public Utilities Commission of the District of Columbia to regulate the price of gas produced within the District and delivered at the district line to a Maryland corporation for distribution in that State. The court, having first pointed out that the jurisdiction of the district commission was subject to the same restrictions as that of the various state commissions with respect to interstate commerce, quoted at length from the opinion in *Missouri v. Kansas Natural Gas Co.*, and then said (at p. 561):—

“It thus appears that not only is the district commission powerless to fix the price at which gas shall

be delivered by the Washington Company to the Maryland Company, but the Maryland commission is likewise without power or authority to act in the premises. Neither of the commissions, nor any authority within the District or the State of Maryland, can regulate this matter, since such regulation would amount to the placing of a burden upon interstate commerce. Its regulation at that point lies alone with Congress, and Congress thus far has failed to act."

It is suggested by the petitioners that this passage was in the nature of a dictum and that the real ground of the decision was that no order purporting to fix the rate for the service in question had in fact been made. It is apparent from the opinion, however, that this is a misconception. The court did, indeed, intimate that the action in question did not have the effect of an order but expressly stated (at p. 560) that this point was immaterial, because such an order, if entered, would be void for want of jurisdiction:—

"Underlying and decisive of the propositions advanced by plaintiffs in this case is the fundamental question of jurisdiction. It is of little importance whether the district commission did or did not fix the price at which the Washington Company shall deliver gas to the Maryland Company at the district line. While we are clearly of the opinion that the commission has not assumed this power, nevertheless it would have done a vain thing if it had attempted it, since the transmission of gas by pipe line from one State to another, or from the District of Columbia to a State, is interstate commerce, and it is beyond the power of a State to impose any burden upon such commerce."

It is said that, if the decision had not rested on the absence of any order, the court would have granted an injunction instead of dismissing the bill. The answer to this is that the case was heard on a motion to

dismiss and that the bill contained nothing to show that the Commission was proposing to take any action for the purpose of enforcing its alleged order; from the court's conclusion that the order, if made, was void on its face, it followed that the plaintiffs were not aggrieved, so that no decree other than one of dismissal could have been entered.

II.

Wholly apart from the Question of Interstate Commerce, the Decree must be affirmed.

1. THE ORDER OF THE PUBLIC UTILITIES COMMISSION WAS IN OTHER RESPECTS SUBJECT TO FATAL CONSTITUTIONAL OBJECTIONS.

If upon any view of the case the decree entered by the Supreme Court of Rhode Island was right, it must be affirmed regardless of the reason given for it.

Sullivan v. Iron Silver Mining Co., 143 U. S. 431.

Wisner v. Brown, 122 U. S. 214.

Even if it be assumed for the sake of argument, therefore, that the ruling of the state court upon the question of interstate commerce was wrong, the petitioners are not aggrieved if the order of the Public Utilities Commission was erroneous in some other respect and so should have been reversed in any event.

(a) *If the Public Utilities Act applies to Service rendered to Customers in other States, it so discriminates against them as to deprive them of the equal Protection of the Laws.*

While the order of the Public Utilities Commission proceeds on the assumption that the respondent is subject to all the burdens of the statute, it is apparent

that, being a foreign corporation with no place of business in Rhode Island, the respondent enjoys none of its benefits. Section 18 of the Public Utilities Act gives the right to invoke the power of the Commission only to "any city or town council, any corporation or any twenty-five qualified voters." It is obvious that "any city or town council" includes only municipal agencies in Rhode Island and that, in like manner "qualified voters" means "voters qualified in Rhode Island." Theoretically, of course, the word "corporation" is broad enough to include a corporation organized and doing business anywhere, but the necessary inference from the context is that only corporations doing business in Rhode Island are intended.

Commonwealth v. Boston, 97 Mass. 555.

The petitioners apparently conceive that, if the word "corporation" is not restrained to Rhode Island corporations, it necessarily includes the respondent. This, however, is a *non sequitur*. It may be that a corporation which is localized in Rhode Island to the extent of having a regular place of business there is included, but it is not possible that the legislature should have meant to include corporations which are not only organized in other States but have no places of business in Rhode Island, while expressly excluding nonresident individuals from the benefits of the act.

It follows that, if the act is construed as applicable to service rendered to customers in other States, it subjects such customers to its burdens but gives only residents of Rhode Island its benefits; nonresidents, therefore, are deprived of the equal protection of the laws, so that, as applied to them, the act is repugnant to the Fourteenth Amendment.

Kentucky Finance Corporation v. Paramount Auto Exchange Corporation, 262 U. S. 544.

Travis v. Yale & Towne Manuf. Co., 252 U. S. 60.

Southern Railway v. Greene, 216 U. S. 400.

It is, of course, true that an act of this kind need not give each individual customer the right to set the administrative machinery in motion and may require that some number which may fairly be regarded as representative unite in a complaint, but this does not bear out the petitioner's contention that an act which expressly limits the right to particular classes of customers can be sustained. In each of the various statutes collected in Appendix C of the petitioners' brief, the right to institute complaints as to rates is given to a certain number of "persons," "corporations," "patrons" or "customers" without regard to their status in other respects. The provision in § 24 of the Massachusetts statute (quoted on p. 98 of the petitioners' brief) as to complaints by "twenty legal voters of a city or town within which any railroad or railway is located" looks, not to the fixing of rates, but merely to an examination of "the condition and operation of such railroad or railway,"—matters of peculiarly local concern.

(b) *The Respondent under the Order in Question is deprived of its Property without due Process of Law.*

The petitioners argue that the State may in the exercise of the police power set aside contracts between public utilities and individual customers when the public good demands. This doctrine is, of course, well es-

tailed, but it is subject to the important qualification that the overriding of contracts solemnly entered into is an extreme measure and that the mere fact that a contract turns out to be unprofitable to those furnishing the service is not a sufficient reason for setting it aside, especially when no customer is making complaint and when, as here, the absence of profit was foreseen at the time the contract was made (Record, pp. 136-137, 146-147, 255). In order to justify the impairing of the obligation of such a contract, it must be shown that, if the contract remains in force, the effect will be not simply to reduce the company's profits, but to prevent it from rendering adequate service to its other customers. The principle was stated as follows in *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379 (at p. 383):—

“The power to fix rates, when exerted, is for the public welfare, to which private contracts must yield; but it is not an independent legislative function to vary or set aside such contracts, however unwise and unprofitable they may be. Indeed, the exertion of legislative power solely to that end is precluded by the contract-impairment clause of the Constitution. The power does not exist *per se*. It is the intervention of the public interest which justifies, and, at the same time, conditions, its exercise.”

This passage was quoted by Judge Brown as applicable to the present situation (295 Fed. Rep. at p. 901; Record, pp. 13-14). He further said:—

“The finding that the contract was unprofitable and therefore discriminatory . . . is a non-sequitur.”

* * * * *

“Before a contract can be interfered with under the police power, it must appear that the contract does in some manner affect adversely the welfare of the public.

"There is nothing in the records to show that the defendant brought to the notice of the Commission any evidence that the company would be unable to perform its full duty to the community whose interest it is the function of the Commission to protect."

It is suggested by the petitioners that from this part of Judge Brown's opinion it appears that the ground of his decision was "that there was no proper finding of facts after a hearing." If this means that, if the first attempt of the Commission to abrogate the contract had been based upon the same evidence as the second, Judge Brown would have held the action of the Commission justifiable, it is a misconception. What the judge ruled in substance was that there must be something more than the remote detriment to the public theoretically resulting from the existence of an unprofitable contract to warrant the abrogation of such a contract, whereas the evidence upon which the order of January 21, 1925, purported to be based presented no suggestion whatever of real detriment to the public.

It is perfectly true, as is asserted by the petitioners on p. 67 of their brief, that the exact point decided in *Arkansas Gas Company v. Railroad Commission*, supra, is not presented by the present controversy, but this does not affect the scope of the principle which the court treated as fundamental. So, in *Wichita Railroad & Light Co. v. Court of Industrial Relations*, 113 Kans. 217, the decision might conceivably have been arrived at on a narrower ground, but the court (at p. 229) made the following statement the basis of the whole discussion:—

"Before a contract can be interfered with through the police power, it must appear that the contract does

in some measure affect adversely the welfare of the public.

"If, for instance, continued performance of the contracts in question should bear so heavily on the power company that its general revenues would be depleted to the extent that recoupment would have to be made at the expense of the other customers, or would otherwise be reflected adversely in its rates or services, to that portion of the public served by the power company, the contracts could and should be abrogated under the police power; but if continued performance of the contracts would only affect the net profits or dividends on that portion of the power company's property devoted to performance of the contracts, then the public interest would not be affected, and there would be no occasion or excuse for the intrusion of the state's police power."

So, in the *Rockingham County Light & Power Company's Case*, 6 N. H. P. S. C. Rep. 154, the Commission said (at p. 156) :—

"The commission would not feel justified in nullifying a contract entered into in good faith by a utility with one of its patrons for service under existing rates for a term of years, where the continuance of service under the contract did not in some way impair the service to the public or increase the rates to other customers. If furnishing the service under the contract simply means a reduction of dividends, the stockholders must stand the loss."

The petitioners on p. 66 of their brief refer to the opinion rendered by the majority of the Circuit Court of Appeals in *Public Utilities Commission v. Wichita Railroad & Light Co.*, 268 Fed. Rep. 37. It is said that, while the decision of the Circuit Court of Appeals was reversed by this court (260 U. S. 48), the views expressed by the Circuit Court of Appeals on this point

were not disapproved. The reason for this, however, is obvious; since this court held that the order of the Public Utilities Commission of Kansas purporting to set aside a contract rate was void for want of jurisdiction, discussion of a point which would arise only in case jurisdiction existed would have been out of order. In view of the decision subsequently rendered by the Supreme Court of Kansas in *Wichita Railroad & Light Co. v. Court of Industrial Relations*, *supra*, under the same statute it is apparent that, if the question should come before the Circuit Court of Appeals again, the decision would be in accordance with the dissenting opinion of Sanborn, J., the material part of which is as follows (268 Fed. Rep. at p. 45):—

“Under the police power of the State and the statutes of Kansas the Commission has the jurisdiction and the authority to raise the rates for the service of public utility corporations prescribed by lawful contracts between it and others, in cases where the agreed rates are confiscatory, unduly discriminatory, and in cases where the good order, health, comfort, or public welfare requires such action; but in my opinion the jurisdiction of the Commission in this direction extends no further. For example, it does not extend to the changing of contract rates of public utilities with private parties not demanded by the public welfare, because one of the parties to one of these contracts was induced to agree to it by mistake, or by accident, or by the fraud or the deceit of the other party to it. It is no ground, either at law or in equity, either in the courts or elsewhere, for the modification or abrogation of a contract for electric energy or for other public utilities for a long term of years, that the contract turns out to be more profitable during some of the years of the term, or more burdensome during other years of the term, to one or the other of the parties, than that party anticipated at the time it signed the agreement that it would be.”

Reliance is also placed by the petitioners upon the line of cases represented by *Interstate Commerce Commission v. Union Pacific Railroad*, 222 U. S. 541, which decide that an order fixing a rate *prima facie* confiscatory cannot be sustained merely on the ground that the earnings of the utility as a whole are adequate. This doctrine is doubtless sound; but it is equally well established that, in determining the reasonableness of a particular rate, the service rendered by the utility in question must be considered as a whole and cannot be treated as constituting, as it were, a series of water-tight compartments; hence the fact that a particular part of the service does not yield the return which may fairly be expected from the property as a whole does not conclusively show that the rate fixed for that service is confiscatory.

Groesbeck v. Duluth, South Shore & Atlantic Railway, 250 U. S. 607.

New York v. Public Service Commission,
269 U. S. 244.

In the case last cited an order requiring the extension of gas mains into what might be unremunerative territory was sustained because, as the court said at p. 249, "there is nothing to show . . . that compliance with the order will necessarily so reduce the company's income as a whole as to be in effect a confiscation of its property."

The petitioners lay stress on the finding of the Commission "that a continuance of service to the Attleboro Company under said schedule No. 68 will be detrimental to the general public welfare, and will prevent the Narragansett Company from performing its full duty towards its other customers" (Record, p. 404). The short answer to this argument is that there is not

a scintilla of evidence to support the finding. Detriment to the Narragansett Company's other customers and to the public generally can, it is manifest, arise only in two ways; either the enjoyment of the contract rate by the respondent may cause other customers to receive less favorable rates than they are entitled to or the Narragansett Company's earnings may be so reduced as to impair its ability to secure the capital needed in order to provide adequate service. There is not the slightest suggestion either in the findings of the Commission or in the evidence that either of these conditions obtains. It is not pretended that the Narragansett Company's rates to other customers are not eminently reasonable (Record, p. 101) or that the service rendered them is in any way inadequate (Record, p. 101); as to its financial condition, it appears that its gross earnings have increased from \$2,566,000 in 1917 to \$6,600,000 in 1923, that for the year 1923 it had a net divisible income of \$1,595,818.94, and that, after paying dividends at the rate of 8 per cent., the surplus for the year was \$293,392.94; also that for the first three months of 1924, after making provision for dividends at the same rate and notwithstanding a reduction in the charges for certain classes of service, there were surplus earnings of \$218,969.02 (Record, pp. 102-103, 123). Throughout the entire period since the making of the contract, the Narragansett Company has paid 8 per cent. dividends; its stock now sells substantially on a 6 per cent. basis (Record, p. 176). The difference between the Narragansett Company's income from service rendered the respondent under the contract rate and that under the rate fixed by the Commission is estimated at \$50,000 per year, of which amount \$38,531.87 represents a return of 8 per cent. on the supposed value of the property used in the

performance of the contract (Record, pp. 86, 87); this is so small a proportion of the company's total income as to make preposterous the suggestion that the company's ability to serve its Rhode Island customers will be perceptibly affected if the contract is not set aside.

Should an additional sum of \$50,000 per year be collected from the respondent and applied to a reduction of the rates charged the other customers,—there being approximately 50,000 customers (Record, p. 99),—the average annual saving to them would be just one dollar apiece! Had there been any reason for reducing their rates to this extent, the Narragansett Company would hardly have crippled itself if it had applied a part of its annual surplus to that purpose.

At the hearing before the Commission there were introduced certain tabulations purporting to show that a loss has resulted each year under the contract and that this loss will increase during the remainder of the contract period. It is not alleged, however, that the loss will endanger the Narragansett Company's dividend rate or substantially impair its net profits (Record, p. 102). Besides this, the question is as to whether the contract may properly be abrogated *now*; whatever the rights of the parties might be if the contract should hereafter become more onerous, it certainly cannot be set aside at this time because of conjectural difficulties in the future.

An essential vice in the Commission's rulings and in the contentions of the petitioners is the idea that the purpose of a public utility act like that now under consideration is to assure to the owners of a utility a satisfactory return on their investment. This, however, is not the primary object of such an act; the aim is to secure for the patrons of a utility adequate serv-

ice at reasonable rates, so that action which looks to an increase of the profits yielded by the utility is never justifiable except as a means of securing the primary end. This point is developed at length in a recent English case.

Southport Corporation v. Birkdale District Electric Supply Co., [1925] Ch. 794; affirmed [1926] A. C. 355.

In dealing with the contention that a contract by an electric lighting company (operating under a so-called "Electric Lighting Order," equivalent to what in the United States is commonly spoken of as a "franchise") not to charge higher rates than those charged by the municipality supplying an adjoining area was *ultra vires* because of the possibility that it might, by causing loss to the company, impair the company's ability to serve its customers, Sargent, L. J., said ([1925] Ch. at p. 824) :—

"It is here said that by agreeing that they will charge no more than will be charged by an adjoining area, which might be and which I think may be shown to be a slightly better field for electrical enterprise than the field in the present case, they have entered into what may be an improvident bargain, which might result in so great a loss of profit or indeed in such an absolute loss as to result in the winding up of the undertaking and an inability to carry it on in the future. There is no evidence at all to that effect, and indeed there seems to have been a very substantial profit earned throughout by the company, indeed such a profit that a substantial margin would be left now if the company were fulfilling the bargain which they entered into. However that may be, if a loss were incurred that would be the result of a miscalculation by the commercial advisers of the company, and the company would be in no worse position than if they had made

an improvident bargain with regard to the price at which they might buy their coal or with regard to any other contract of real importance. All that is one of the risks which has to be run by a concern carried on for the purpose of profit. In my judgment it would be an extraordinary extension of this doctrine of ultra vires or repugnancy to say that in such a case as this a commercial undertaking was deprived of its ordinary discretion as to fixing the price at which the services rendered or the commodities supplied should be rendered or supplied."

In the House of Lords Lord Birkenhead referred with approval to the opinion of Sargant, L.J., and Lord Sumner said ([1926] A. C. at p. 373) :—

"The argument must be either that it is one of the direct statutory objects of the Electric Lighting Order that the undertakers should make a profit or at least not suffer any loss, or else that this is an indirect statutory object, since, if the undertakers make no profit, they will either pursue the undertaking without zeal or will drop it, so soon as this imaginary rate-war exhausts their resources.

"My Lords, I am afraid this is beyond me. It may be the policy of the Electric Lighting Acts to get trading companies to take up and work Electric Lighting Orders in hope of gain, but I cannot see that it is any part of the direct purposes of the Order that money should be made or dividends distributed. The primary object of the Electric Lighting Order was to get a supply of electric energy for the area in question, a thing only feasible at the time by getting a trading company to undertake the business. It was not to secure that certain charges should be made or that certain results should be shown upon a profit and loss account."

In *Colorado v. United States*, [1925-6] U. S. Adv. Ops. 520, this court (at p. 522) has expressed similar views as to the considerations governing an applica-

tion to the Interstate Commerce Commission under the Transportation Act of 1920 for authority to abandon a railroad:—

"The argument [*i.e.*, that the Interstate Commerce Commission has no jurisdiction to authorize the abandonment of an intrastate branch of an interstate railroad system] rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty."

The order of the Commission has the effect of depriving the respondent of its property without due process of law for the further reason that, even if there had been evidence justifying the setting aside of the contract, the Commission was not on any theory warranted in going further by way of increasing the rate than was absolutely necessary to relieve the supposed exigency. The present case, in other words, involves in reverse form the principle that rates duly established by the State cannot be pronounced too low simply because they yield a less profit than may seem fair from the standpoint of the utility or expedient from that of the public; they must be actually confiscatory before they can be interfered with.

Detroit & Mackinac Railway v. Railroad Commission, 203 Fed. Rep. 864; affirmed 235 U. S. 402.

So here, the rate cannot be fixed as if the contract did not exist and as if the only question was what rate would yield what is supposed to be a normal profit; a

rate fixed by a valid contract can be raised only to such extent as is absolutely demanded by the public necessity, even though the rate as so raised may be less than might be deemed reasonable on general principles. The Commission, however, made no finding on this vital point. The contention of the Narragansett Company was that it was entitled to a profit of 8 per cent. on its business generally and that the rate for service rendered to the respondent should be so raised that the return on the investment devoted to the furnishing of this service would reach that figure (Record, pp. 57, 229). It was virtually conceded that only about \$23,700 of additional income was needed annually to offset the increase in generating cost since the contract was made, yet a rate calculated to bring in each year at least \$50,000 more than the old rate was asked for (see analysis on p. 42 of this brief). The Commission in substance adopted this contention, as appears from the following passage in its decision (Record, p. 419) :—

"The Commission find that under present conditions a return of approximately 8% on the value of the investment devoted to the furnishing of service to the Attleboro Company is a reasonable return and that considering all the evidence submitted, service by the Narragansett Company under schedule R. I. P. U. C. No. 125 will yield to the Narragansett Company approximately 8% on the investment devoted by the Narragansett Company to the furnishing of such service."

The Commission, in other words, went about the fixing of the rate exactly as if the contract did not exist. It follows that, even if there had been justification for setting the contract aside, the rate actually fixed would still subject the respondent to an unwarrantable bur-

den and deprive it of its property without due process of law.

(c) *The Contract between the Respondent and the Narragansett Company cannot be set aside without impairing the Obligation of the Contract between the Respondent and the State of Rhode Island implied in the Approval of the original Rate.*

The respondent does not, of course, contend that, if the order of the Commission were valid in other respects, it could be attacked as impairing the obligation of the contract between the respondent and the Narragansett Company. The contract as to which this constitutional provision is invoked is the contract between the respondent and the State of Rhode Island implied in the Commission's approval of the contract and the rule of law relied on is the elementary one that a contract entered into by a State with respect to the rates to be charged by a public utility is no less binding than other contracts. Unless the right to fix different rates is expressly or impliedly reserved, the State cannot, without impairing the obligation of the contract, establish inconsistent schedules.

St. Cloud Public Service Co. v. St. Cloud,
265 U. S. 352.

Southern Iowa Electric Company v. Chariton, 255 U. S. 539.

Cleveland v. Cleveland City Railway, 194 U. S. 517.

Detroit v. Detroit Citizens' Street Railway, 184 U. S. 368.

In the present case, the 20-year term was as much an essential part of the rate embodied in the Schedule

R. I. P. U. C. 68 as the price to be charged. The schedule expressly recited "Term of contract twenty (20) years and thereafter unless discontinued by either party" (Record, p. 276). The approval of the contract rate by the Commission,—assuming that the Commission had jurisdiction in the matter at all,—necessarily imported a finding that it was consistent with the public interest that the Narragansett Company be permitted to take upon itself the obvious risk that, as a result of unforeseen conditions, the rate might prove unremunerative. Hence the State, by the approval of the rate, bound itself not to take inconsistent action during the twenty-year period. It is not competent for the State, under color of exercising the police power, to reverse the finding made by its officers when the rate was first submitted and in effect to say that they made a mistake, so that their adjudication may now be treated as nugatory, especially after this adjudication has been acted upon and the position of the respondent radically changed in reliance upon it; the State must be deemed to have entered into a contract not to disturb the rate for the period specified.

New York & Queens Gas Co. v. Prendergast.

1 Fed. Rep. (2d), 351.

Consolidated Gas Co. v. Prendergast. 6 Fed.

Rep. (2d), 243, 280.

State v. Marshall. 98 Ohio St. 467.

Section 33 of the Public Utilities Act, cited by the petitioners, does not affect the situation; whatever may be the scope of such a provision, it cannot in any event be construed as giving power to reopen a question which has in effect become *res judicata*.

Nicholson v. Piper, [1907] A. C. 215.

2. THE PUBLIC UTILITIES ACT, ACCORDING TO ITS TRUE CONSTRUCTION, GIVES THE COMMISSION NO JURISDICTION TO MAKE AN ORDER LIKE THAT IN QUESTION, EVEN IF THE ACT WOULD NOT BE UNCONSTITUTIONAL IF SO CONSTRUED.

The petitioners assert that the Supreme Court of Rhode Island impliedly decided that the Public Utilities Act gave the Commission jurisdiction to make the order in question, except as prevented by the commerce clause. The opinion, however, does not warrant this contention; it is apparent that, being satisfied that upon the fundamental ground the respondent was entitled to succeed in any event, the court deemed discussion of the various preliminary objections superfluous. Had it become material to determine whether, as a matter of statutory construction, the order was within the Commission's jurisdiction, the order must have been reversed on that ground.

Section 2 of the act purports to extend the power of the Commission to the regulation of every corporation, etc., owning or operating "any railroad or street railway within this state" and to every corporation, etc., owning or operating "any plant . . . within this state . . . for the production . . . of gas, electricity," etc. There is nothing in the act, as the petitioners suggest, expressly to limit the jurisdiction of the Commission to conveyance by common carriers wholly within the State. It is apparent, however, that, in order to escape fatal constitutional difficulties, the broad language as to railroads and street railways must be taken with the implied qualification that interstate service is not within the purview of the act. Even assuming that the clause as to gas, electricity, etc., would not necessarily be so construed if it stood alone, the significant fact is that this clause appears

as a part of the same sentence as the clause respecting railroads and street railways and is substantially identical in frame. When the legislature used in the clause as to railroads and street railways language having a well-defined meaning as applied to those subjects and immediately thereafter in the same sentence used similar language with respect to gas and electricity, the presumption is that the words were used in the same sense in the later clause as in the earlier.

Gillen's Case, 215 Mass. 96, 98.

As has been pointed out above, moreover, the right to invoke the power of the Commission is limited by § 18 of the act to residents of Rhode Island. Even if this discrimination between residents and nonresidents did not affect the constitutionality of the act, there would still be a presumption that the legislature did not intend to regulate transactions with nonresidents. Very explicit language would be necessary to warrant the conclusion that such an unfair discrimination was intended, even if constitutionally permissible. On the other hand, it is not difficult to infer that the legislature, perceiving the complications which would at once be encountered if it were attempted to regulate interstate transactions, preferred to leave such transactions outside the scope of the act.

3. IF THE ORDER OF THE COMMISSION HAD NOT BEEN OPEN TO JURISDICTIONAL OBJECTIONS, IT MUST NEVER-THELESS HAVE BEEN REVERSED, BECAUSE OPPOSED TO THE GREAT WEIGHT OF THE EVIDENCE.

Under §§34, 36 and 37 of the Public Utilities Act the respondent is entitled to have the Commission's find-

ings of fact reviewed substantially as upon an appeal in equity.

Ohio Valley Water Co v. Ben Avon Borough,
253 U. S. 287.

Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S. 510.

The petitioners suggest that this right of review on the facts is limited to so much of the case as relates to the constitutional points. Even if this were true, it would still be necessary for the court to form an independent judgment upon substantially all the questions of fact, since it would, on any theory, be a violation of the respondent's constitutional rights to set the contract aside except in so far as the public interest may require and since the issue whether there is any such necessity is sharply contested. The petitioners, however, fail to appreciate that the question is not as to what provisions for review it was necessary to insert in the act in order to save it from unconstitutionality, but as to the extent of the appeal actually granted. The provisions of the Public Utilities Act as to appeals from orders of the Commission (§§34, 36, 37), are almost identical in language with the corresponding provisions of the General Laws of Rhode Island, 1923, c. 339, §§25, 27, 30, 32 (printed in the appendix to this brief) as to appeals from decrees of the Superior Court in equity. This makes it clear that, whatever the rule may be under other statutes, an appeal under the Public Utilities Act of Rhode Island brings up all questions of fact pertinent to the reasons of appeal.

The Baltimore, 8 Wall. 377.

Ricelli v. Providence Gas Co., 44 R. I. 76.

Even if all the jurisdictional difficulties were out of

the way, therefore it would not follow that the petitioners were entitled to have the decree of the state court reversed. This court, it is assumed, would not attempt to decide questions turning upon conflicting evidence, but, if the decision of such questions became needful, would remand the case to the state court for that purpose. It is apprehended, however, that the case will not be sent back for a rehearing which would inevitably lead to a new decree setting aside the order of the Commission. In other words, the petitioners cannot ask this court to disturb the decree of the state court, if it appears that a like decree must have been entered, even though the state court had overruled all the jurisdictional objections and had gone into the evidence at large. A brief consideration of facts which are conceded by the petitioners or established by undisputed evidence will, it is believed, demonstrate that this is the situation.

The Narragansett Company admits and the Commission finds that the rate named in Schedule R. I. P. U. C. 125 is aimed solely at the Attleboro Company and that no other consumer will be affected by it (Record, pp. 94, 96, 385). The purpose of the Narragansett Company is to obtain from the respondent some \$50,000 a year additional income, whereas Mr. Gray, the company's rate expert, conceded that, if the unit cost of the generating plant had remained at \$45, the company would not have complained of the contract rate (Record, p. 148). The Narragansett Company alleged that, since the contract was entered into, the unit cost of the generating plant had increased from \$45 to \$89.15 and the Commission found that this increase was the principal reason for the results of which the Narragansett Company complained (Record, p. 403). The proposed rate includes an annual

investment charge per kilowatt of demand of \$12.37 on account of generating cost (Record, pp. 226, 231). This is on the basis of the average unit cost of \$89.15 (Record, p. 226). If the average unit cost had remained at \$45, the allowance on account of generating cost in the annual investment charge would have been practically one-half of \$12.37—say \$6.20. The effect of this increase in the average unit cost upon the annual cost of performing the contract is arrived at by multiplying the increase in the charge per kilowatt of demand by the amount of the respondent's peak load, which is 3,840 kilowatts (Record, p. 229). The result is that, on the Narragansett Company's own figures, only about \$23,700 is needed to offset the increase in the unit cost of the generating plant, yet the rate established by the Commission is calculated to yield annually at least \$50,000 more than the contract rate.

The Narragansett Company, moreover, concedes that the contract was not expected to produce during the first ten years of its operation a normal rate of profit (Record, pp. 137, 146-147, 167, 255) and it is only by an unfair method of figuring that the contract can be shown to have resulted in an actual loss to the Narragansett Company or to have done more than merely reduce somewhat the profit on that part of the plant devoted to performing it. The Narragansett Company's method of figuring is open to criticism in the following respects, among others:—

1. It apportions "generating plant costs" among its customers according to the maximum primary demand. Although a great deal of secondary current is disposed of at a profit (Record, p. 78), this is totally disregarded. The result is very unfair to a customer which, like the respondent, takes only primary current.

Thus in 1923 the respondent, taking about 1/35 of the total output of the Narragansett Company (Record, p. 87), is chargeable, according to the Narragansett Company's new method of figuring, with $3600/55000$ or about 1/15 of the capital cost; while the New England Power Company, which takes one-half of the total output (Record, p. 90),—seventeen and a half times as much current as the respondent,—is charged with only a little over four times as much of the generating plant capital cost.

2. The peak primary load of the Narragansett Company is taken at too low a figure (Record, pp. 90, 132, 158, 301, 318; see also argument for respondent before Commission, Record, pp. 201-203).

3. The contract required the Narragansett Company to build the necessary transmission line, the part of the same in Massachusetts to be the property of the respondent and the Seekonk Electric Company (a subsidiary of the Narragansett Company which was to own the line between the Rhode Island-Massachusetts boundary and the city limits of Attleboro) and the cost, not exceeding \$4,500 per mile in any event, to be repaid by these companies to the Narragansett Company (Record, pp. 258-259). The actual cost was considerably more than \$4,500 per mile. In its computations the Narragansett Company has assumed as the cost of that part of the transmission line which is situated in Rhode Island the cost of the entire line, less the sums paid by the Attleboro and Seekonk Companies (Record, pp. 161-162). This attempt to recoup the loss incurred in building the transmission line in Massachusetts is unwarranted.

4. In apportioning the overhead (Record, p. 237), no consideration is given to the fact that the respondent is a single wholesale customer (Record, p. 85).

5. Sundry interest charges are included which are unjustified (Record, pp. 159, 185-186).

If only a part of these errors are corrected, it becomes apparent that the Narragansett Company is not suffering an out-of-pocket loss from the contract but is merely failing to receive the full eight per cent. of profit on it (Record, pp. 87, 137-138).

It is apparent, therefore, that the Commission's order was unjustifiable. Even if it could be said that the evidence warranted a finding that *some* increase ought to be made, the rate actually fixed was so high as to be manifestly "unlawful" and "unreasonable" within the meaning of §34 of the Public Utilities Act. Hence the order must have been set aside, even if the jurisdictional points had been out of the case.

It follows that the decree of the Supreme Court of Rhode Island, from whatever angle it is viewed, was rightly entered and must be affirmed.

ROBERT G. DODGE.
HAROLD S. DAVIS.

APPENDIX

**RHODE ISLAND LAWS OF MAY, 1884, PAGE 29,—
“AN ACT TO INCORPORATE THE NARRAGANSETT ELECTRIC LIGHTING COMPANY”**

(Passed May 29, 1884.)

It is enacted by the General Assembly as follows:

SECTION 1. Isaac M. Potter, James G. Markland, Samuel W. Peckham, Henry C. Bradford, Frederick I. Marcy, Martin V. Brady, Nathaniel T. Spink and John B. Allen, their associates, successors and assigns, are hereby constituted a corporation by the name of “The Narragansett Electric Lighting Company,” for the purpose of prosecuting a general electric lighting, heating and power business; that is to say, the business of producing, using and supplying light, heat and power generated by means of electricity; and for the transacting of other business connected therewith; with all the powers and privileges, and subject to all the duties and liabilities set forth in chapters 152 and 155 of the Public Statutes, and in the statutes in amendment thereof, and in addition thereto.

SEC. 2. The capital stock of said corporation shall not exceed one hundred and fifty thousand dollars, to be fixed in amount from time to time, and to be divided into such number of shares, and the par value of each share to be fixed at such amount as the corporation may by vote determine; and said shares shall be non-assessable.

SEC. 3. The stock or shares of every stockholder shall be pledged and liable to the corporation for all debts and demands due and owing from such stockholder to the corporation, and whether overdue or due at a future day; and said stock or shares may be sold for the payment of such debts and demands in such manner as the by-laws of said corporation may prescribe; and in case the proceeds of such sale shall be insufficient to discharge such debts or demands, with the inci-

dental expenses of sale, the corporation may have their action against the debtor for the balance due.

SEC. 4. Said corporation, with the consent of the town and city councils where wires and conductors for electricity are to be put up, laid, used and maintained, may put up, lay, use and maintain wires and conductors for electricity, under and over highways, streets and sidewalks, and, with the written consent of the owners thereof, upon and over buildings, subject to such ordinances, regulations and orders of the city and town councils of the cities or towns where such wires or conductors shall be maintained, as are or may be enacted with respect to such wires and conductors; and said wires and conductors located above any highway shall be removed whenever required by general law or by order of such city or town council, after thirty days' notice in writing shall be given to said corporation; and said corporation shall be entitled to no compensation on account of such removal.

SEC. 5. There shall be an annual meeting of the stockholders, in the city of Providence, at such time as the by-laws shall prescribe, for the choice of officers, and for such other business as may come before them.

SEC. 6. Said corporation shall have an office or place of business in the city of Providence.

SEC. 7. This act shall take effect from and after its passage.

EXTRACTS FROM THE PUBLIC UTILITIES ACT OF
RHODE ISLAND (CHAPTER 795 OF THE PUBLIC
LAWS OF 1912, AS AMENDED BY CHAPTER 1651
OF THE PUBLIC LAWS OF 1918; NOW CONSTITU-
TING CHAPTER 253 OF THE GENERAL LAWS
OF RHODE ISLAND, 1923).

SECTION 1. This act shall be known as the Public Utilities Act, and shall apply to the public utilities herein described and to the commission hereby created, and to the public utility corporations and persons herein mentioned and referred to.

SEC. 2. The term "commission," when used in this act, means the public utilities commission hereby created.

The term "commissioner," when used in this act, means one of the members of such commission.

The term "corporation," when used in this act, includes a corporation, company, association, and joint stock company or association.

The term "person," when used in this act, includes an individual, corporation, and a firm or copartnership.

The term "public utility," when used in this act, shall mean and embrace, and apply to every corporation, company, person, association of persons, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any railroad or street railway within this state, or that now or hereafter may operate or do business as a common carrier within this state; and to every corporation, company, person, association of persons, their lessees, trustees or receivers, appointed by any court whatsoever, that now or hereafter may own, lease, operate, manage or control any plant or equipment, or any part of any plant or equipment, within this state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery, or furnishing of gas, electricity, water, light, heat or power, either directly or indirectly to or for the public: *Provided*, that this

act shall not be construed to apply to any public water works and water service owned and furnished by any city or town.

The term "common carrier," when used in this act, shall mean and apply to and embrace all railroad corporations, street railway corporations, express companies, freight companies, freight-line companies, dining-car companies, steam-boat, power-boat and ferry companies, and all persons and associations of persons, whether incorporated or not, and their lessees, trustees and receivers, appointed by any court whatsoever, operating any agency for public use in the conveyance of persons or property within this state by land or by water, or both.

The term "railroad," when used in this act, includes every railroad other than a street railway, by whatsoever power operated, for public use in the conveyance of persons or property for compensation, with all bridges, ferries, tunnels, switches, spurs, tracks, stations, wharves and terminal facilities of every kind used, operated, controlled, leased or owned by or in connection with any such railroad.

The term "street railway," when used in this act, includes every railway, by whatsoever power operated, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any street, avenue, road, highway, bridge or public place in any city or town, and including all switches, spurs, tracks, rights of trackage, subways, tunnels, stations, terminals, and terminal facilities of every kind used, operated, controlled or owned by or in connection with any such street railway.

The terms "plant or equipment," when used in this act, shall mean and apply to and embrace all the real estate, easements, buildings, machinery, apparatus, devices, rolling stock, and tangible property of whatsoever kind and nature, and wherever located, used, controlled, operated, leased or owned by a public utility in the conduct of the business thereof.

The term "service" is used in this act in its broadest and most inclusive sense.

SEC. 3. There shall be a public utilities commission for the state, which commission shall be vested with and possessed of the powers and duties specified in this act, and also with all the powers necessary to enable said commission to carry out fully and effectually all the purposes of this act. Said commission shall be constituted of three members who shall be duly qualified electors of this state and who shall be severally sworn to the faithful performance of their duties, and who shall hold office for the terms of their appointment or until their successors respectively shall be appointed and qualified to act. At the present session of the general assembly, within ten days after the passage of this act, the governor, by and with the advice and consent of the senate, shall appoint three such persons to be members of the public utilities commission, one to hold office until the first day of February, A.D. 1918, one to hold office until the first day of February, A.D. 1916, and one to hold office until the first day of February, A.D. 1914. In the month of January, A.D. 1914, and in the month of January in each second year thereafter, the governor, by and with the advice and consent of the senate, shall appoint one member of said commission to hold office until the first day of February in the sixth year after his appointment, to succeed the member whose term will next expire. The governor shall designate one of the commissioners appointed by him at the present session of the general assembly as chairman of said commission, and thereafter the commissioners shall elect one of their members as chairman upon the appointment of any commissioner for a new term; or whenever a vacancy shall occur in said office.

SEC. 18. Upon a written complaint made against any public utility by any city or town council, or by any corporation, or by any twenty-five qualified electors, that any of the rates, tolls, charges or any joint rate or rates of any public utility are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever of any public utility, affecting or relating to the con-

veyance of persons or property or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water, or power, or any service in connection therewith, or the conveyance of any telephone or telegraph message, or any service in connection therewith, is in any respect unreasonable, insufficient or unjustly discriminatory, or that any service is inadequate or cannot be obtained or is unsafe, or the public safety is endangered thereby, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, regulations, measurements, practice, act or service complained of shall be entered by the commission without a formal public hearing. When any complaint shall be made by twenty-five or more qualified electors, such complaint shall designate one of the complainants upon whom shall be served all notices, orders and citations required by this act to be served upon complainants.

SEC. 20. The commission shall give the public utility and the complainant, if any, ten days' notice of the time and place where and when such hearing and investigation will be held and such matters considered and determined. Both the public utility and the complainant shall be entitled to be heard and appear by counsel, and shall have process to enforce the attendance of witnesses.

SEC. 21. If upon such a hearing and investigation had under the provisions of this act, the commission shall find any existing rates, tolls, charges, or joint rate or rates of any public utility, to be unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of this act, the commission shall have power to fix, and order substituted therefor, such rates, tolls, charges, or joint rates as shall be just and reasonable.

SEC. 26. Whenever the commission shall believe that any

of the rates, tolls, charges, or any joint rate or rates, charged, demanded, exacted or collected by any public utility are in any respect unreasonable, or unjustly discriminatory, or otherwise in violation of this act; or that any regulation, measurement, practice or act whatsoever of such public utility affecting or relating to the conveyance of persons or property, or any service in connection therewith, or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power, or any service in connection therewith, or the conveyance of telephone or telegraph messages, or any service in connection therewith, is in any respect unreasonable, insufficient or unjustly discriminatory; or that any service of such public utility is inadequate or cannot be obtained, or is unsafe, or the public safety is endangered thereby, or that an investigation of any matter relating to a public utility should, for any reason be made, it may on its own motion, summarily investigate the same with or without notice.

SEC. 27. If, after making such summary investigation, the commission becomes satisfied that sufficient grounds exist to warrant a formal hearing being ordered as to the matters so investigated, it shall furnish such public utility interested, a statement notifying the public utility of the matters under investigation. Ten days after such notice has been given, the commission may proceed to set a time and place for a hearing and investigation.

SEC. 28. Notice of the time and place for such hearing and investigation shall be given to the public utility and to such other interested persons as the commission shall deem necessary, as provided in Section twenty hereof, and thereafter the proceedings shall be had and conducted in reference to the matter investigated in like manner as though complaint had been filed with the commission relative to the matter investigated, and the same order or orders may be made in reference thereto as if such hearing and investigation had been made on complaint.

* * * * *

SEC. 33. The commission may at any time upon notice to the public utility and after opportunity to be heard as provided in section twenty, rescind, alter, or amend any order fixing any rate, toll, charge, joint rate or rates, or any other order made by the commission, and certified copies of the same shall be served and take effect as herein provided for original orders.

SEC. 34. Any public utility or any complainant aggrieved by any order of the commission fixing any rate, toll, charge, joint rate or rates, or any order fixing any regulation, measurement, practice, act or service, may appeal to the supreme court for a reversal of such order on the ground that the rate, toll, charge, joint rate or rates fixed in the order are unlawful or unreasonable, or that any such regulation, measurement, practice, act or service fixed in such order is unlawful or unreasonable.

The party prosecuting the appeal shall file a petition with the clerk of the supreme court within seven days from the service of the order appealed from, and such petition shall set forth grounds upon which it is claimed that the order appealed from is unlawful or unreasonable. Thereupon the clerk of the supreme court shall issue citation to all parties in interest, including the commission, returnable at any time within thirty days from date of its issue in the discretion of the court, and the court shall hear and determine, as soon as may be, the matter, and either sustain or reverse the order appealed from. The court is hereby given authority to regulate the practice and procedure in such appeal by such rules as it may see fit to make: *Provided*, that all such appeals shall have precedence over other civil cases in the supreme court.

SEC. 36. At any hearing in the course of such an appeal, a transcript of the testimony before the commission in such case, duly certified by the stenographer taking the same, and allowed by one of the commissioners, shall be admitted as testimony.

SEC. 37. If, upon the hearing of the appeal, newly discovered evidence shall be introduced by the appellant which is found by the court to be of such a character, and of sufficient importance, to warrant a reconsideration of the order appealed from, the court, before proceeding to render a final decision, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceeding in said action for sixty days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may alter, amend or rescind the order appealed from, and shall report its action thereon to the court within fifty days from the receipt of such evidence. If the commission shall rescind the order appealed from, the appeal shall be dismissed. If it shall alter or amend the same, such altered or amended order shall take the place of the original order appealed from and the court shall render its decree thereon as though made by the commission in the first instance. If the original order shall not be altered, amended or rescinded by the commission, the final decision shall be rendered upon such original order and the final decree entered in conformity therewith.

SEC. 39. If any public utility or any agent or officer of a public utility, as defined in this act, shall directly or indirectly, by any device whatsoever, or otherwise charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in, or affecting, or relating to, the transportation of persons or property between points within this state, or the production, transmission, delivery or furnishing of heat, light, water or power, or the conveyance of telegraph or telephone messages, or for any service in connection therewith, than that prescribed in the published schedules or tariffs then in force or established as provided herein or than it charges, demands, collects, or receives from any other person, firm or corporation for a like and contemporaneous service, under substantially similar circumstances

and conditions, such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than fifty dollars nor more than five hundred dollars for each offense.

SEC. 40. If any public utility shall make or give any undue or unreasonable preference or advantage to any particular person, firm, or corporation, or shall subject any particular person, firm, or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such public utility shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than two hundred dollars nor more than five hundred dollars for each offense.

SEC. 42. The provisions of Sections thirty-nine, forty and forty-one of this act shall be subject to the following exceptions:

(a) A public utility may issue or give free transportation or service to its employees and their families, its officers, agents, surgeons, physicians and attorneys-at-law, and to the officers, agents, and employees and their families of any other public utility.

(b) With the approval of the commission, any public utility may give free transportation or service, upon such conditions as such public utility may impose, or grant special rates therefor to the state, to any town or city, or to any water or fire district, and to the officers thereof, for public purposes, and also to any special class or classes of persons, not otherwise referred to in this section, in cases where the same shall seem to the commission just and reasonable, or required in the interests of the public, and not unjustly discriminatory.

(c) With the approval of the commission, any public

utility operating a railroad or street railway may furnish to the publishers of newspapers and magazines, and to their employees, passenger transportation in return for advertising in such newspapers or magazines at full rates.

(d) With the approval of the commission, any public utility may exchange its service for the service of any other public utility furnishing a different class of service.

(e) Any free frank, pass, transportation or service heretofore issued, given or authorized for use or enjoyment during the year 1912, or any portion thereof, shall remain lawful and of full effect under the condition and during the period for which it was issued, given or authorized during the year 1912.

SEC. 48. *(As amended by Chapter 1651, Pub. Laws, 1918).* Every public utility shall file with the commission, within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. A copy of so much of said schedules as the commission shall deem necessary for the use of the public shall be printed in plain type, or typewritten, and kept on file in every station or office of such public utility where payments are made by the consumers or users, open to the public in such form and place as to be readily accessible and conveniently inspected, and as the commission may order. The commission may determine and prescribe the form in which the schedules, required by this section to be kept open to public inspection, shall be prepared and arranged, provided, that with respect to public utilities subject to the federal "Act to Regulate Commerce," so called, the form of such schedules shall be that from time to time prescribed by the Interstate Commerce Commission. No change shall be made in the rates, tolls, and charges which have been filed and published by any

public utility in compliance with the requirements of this section, except that after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rates, tolls or charges will go into effect. Whenever the commission receives such notice of any change or changes proposed to be made in any schedule filed under the provisions of this section, it shall have power either upon complaint as specified in Section eighteen hereof, or upon its own motion and upon such notice as provided for in Section twenty hereof, to hold a public hearing and make investigation as to the propriety of such proposed change or changes. After notice of any such investigation, the commission shall have power by any order served upon the public utility affected to suspend the taking effect of such change or changes pending the decision thereon, but not for a longer period than three months beyond the time when such change or changes would otherwise take effect. After such hearing and investigation, either upon complaint as specified in Section eighteen hereof or upon its own motion the commission may make such order in reference to any proposed rate, toll or charge as may be proper. At any such hearing involving any proposed increase in any rate, toll or charge, the burden of proof to show that such increase is necessary in order to obtain a reasonable compensation for the service rendered shall be upon the public utility: *Provided*, that the commission may, in its discretion and for good cause shown, allow changes within less time than required by the notice herein specified, and without holding the hearing and investigation herein provided for, or modify the requirements of this section with respect to filing and publishing tariffs either in the particular instance or by general order applicable to special or particular circumstances or conditions.

EXTRACTS FROM CHAPTER 339 OF THE GENERAL LAWS OF RHODE ISLAND, 1923.

SEC. 25. Any party aggrieved by a final decree of the superior court in any cause in equity or proceeding following the course of equity may, within thirty days after the entry thereof, and any party aggrieved by a final judgment in any proceeding in, or in the nature of, a prerogative writ, except habeas corpus, may, within five days after entry of such judgment, appeal to the supreme court. Such appeal shall be taken by filing a claim of appeal, with a statement of the reasons thereof, in the office of the clerk of the court from which the appeal is taken. The appellant, at the time of filing such claim, shall file a written request to the court stenographer for a transcript of the testimony and shall advance the estimated fees of the court stenographer for transcribing such testimony, as may be required; whereupon, and upon compliance with such orders as may be made under the provisions of section twenty-eight of this chapter, all proceedings under the decree or judgment appealed from shall be stayed.

SEC. 27. Upon an appeal being taken and such transcript of the testimony as may be required being allowed and returned, as aforesaid, or in case of the disallowance or of failure to allow and return the transcript within twenty days from the filing thereof with the clerk, the clerk of the superior court shall forthwith certify the cause and all the papers therein to the supreme court. Thereupon, on motion of either party, or by agreement, the cause may be assigned for hearing on the question of the correctness of the transcript.

SEC. 30. No new testimony shall be presented to the supreme court on appeal, but in case of accident or mistake, or erroneous ruling excluding evidence in the superior court,

the supreme court may grant leave to parties to present further evidence, and may provide by general rule or special order for the taking of such evidence.

SEC. 32. Upon any cause being brought by appeal to the supreme court that court shall hear and determine such appeal and affirm, reverse, or modify the decree or judgment appealed from and make such orders and decrees therein as shall be just.



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WM. R. STANSE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

No. 217.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND ET AL.,
vs.
ATTLEBORO STEAM & ELECTRIC COMPANY.

MOTION
OF SOUTHERN SIERRAS POWER COMPANY,
FOR LEAVE TO FILE BRIEF AS *AMICUS
CURIAE*.

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,
*Attorneys for The Southern
Sierras Power Company,
amicus curiae.*

NEWMAN JONES,
Of Counsel.



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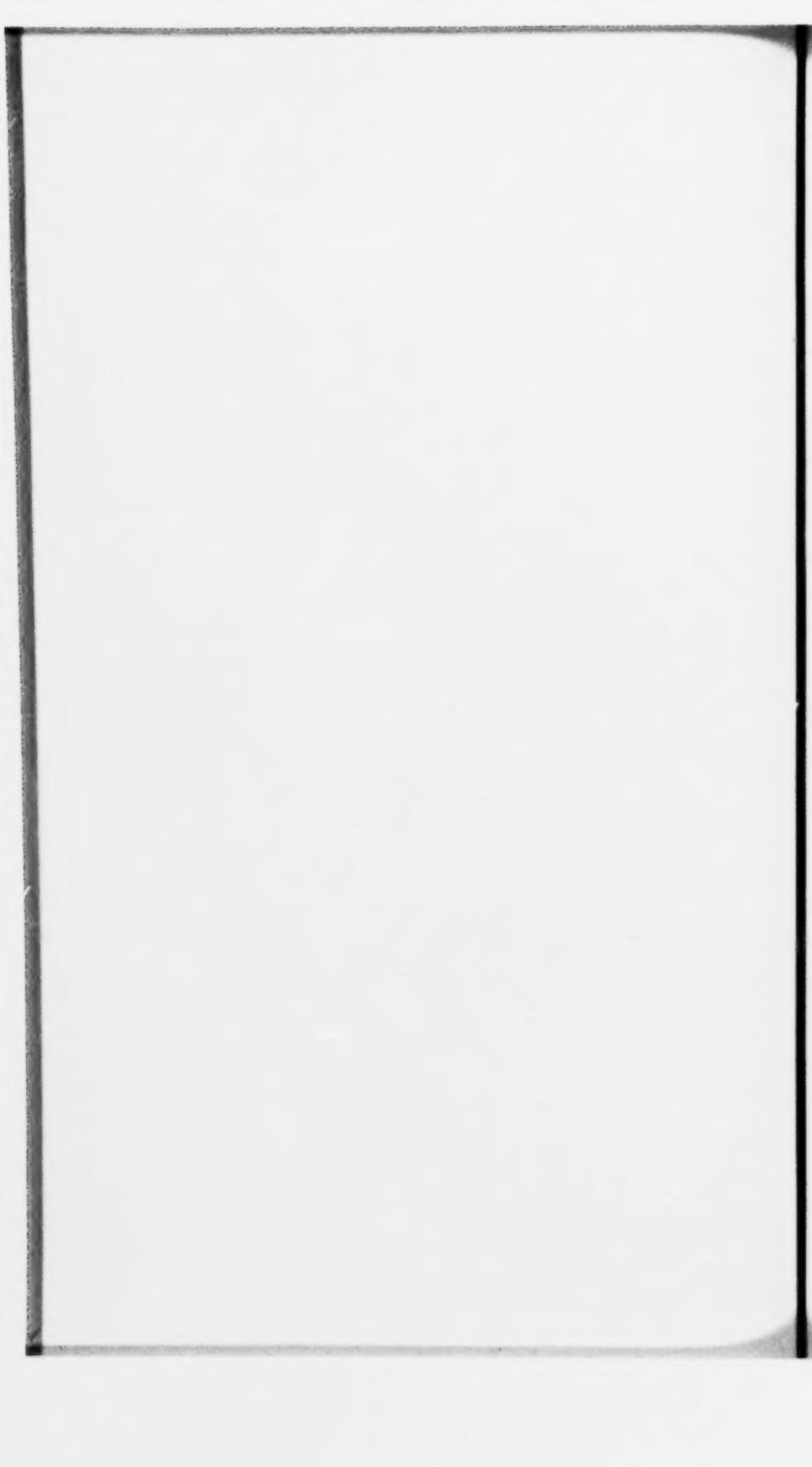
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1926.

No. 217.

PUBLIC UTILITIES COMMISSION OF RHODE ISLAND ET AL.,

vs.

ATTLEBORO STEAM & ELECTRIC COMPANY.

MOTION

OF SOUTHERN SIERRAS POWER COMPANY,
FOR LEAVE TO FILE BRIEF AS *AMICUS
CURIAE*.

Comes now the Southern Sierras Power Company,
and moves that it be granted leave of this honorable
court to file a brief in the above-described cause, as
amicus curiae.

As grounds for this motion, said company represents
to the court:

1. That it is a Wyoming corporation, doing business as a public service company in California; that it generates and sells electric power in the State of California, under regulations by the Railroad Commission of that State; that its business is primarily that of distributing and selling power directly to California consumers.
2. That within the State of California it also sells power to a public service corporation of Arizona, for distribution and sale in Arizona; that such power is delivered in California, to the transmission line of the Arizona Company, and is transmitted from California to Arizona by the Arizona company.
3. That in a suit now pending in the District Court of the United States for Arizona, entitled The Southern Sierras Power Company vs. Arizona Edison Company, being Case No. E-153, Phoenix, the answer filed by defendant raises the same point involved in the cause now pending in this court, to wit, the constitutional power of a state public utility commission to fix rates at which electric power may be sold for transmission to, and distribution and sale in a different State.

Respectfully submitted,

THE SOUTHERN SIERRAS POWER COMPANY,

By CHAS. F. CONSAUL,

CHAS. C. HELTMAN,

Attorneys.

NEWMAN JONES,

Of Counsel.

BRIEF.

It is the desire of the Southern Sierras Power Company, appearing as friend of the court, to call to notice additional reasons for holding that it lies within the power of the Public Utility Commission of Rhode Island to regulate rates to be charged by a public service corporation of that state, for electric power supplied, even though such power is supplied to a consumer at the state line, for actual use in another state.

As clearly laid down in various decisions, certain functions of the respective states may be exercised, even though they may result indirectly or to some extent in affecting interstate commerce, *provided*, that the Federal government shall not have exercised its power to control or regulate such phase of interstate commerce as may be so affected. (Simpson v. Shepard, 230 U. S. 352, Minnesota Rate Case.)

In support of that thought, attention is asked to the fact that the Federal government has thus far sought to exercise control over rates to be charged for supply of electrical power, only in the legislation commonly known as the "Federal Water Power Act," approved June 10, 1920 (41 Stats. 1063), with amendment of March 3, 1921 (41 Stats. 1353).

The general purpose of that act is to provide for the development of water power projects upon public lands and upon navigable waters of the United States, primarily under licenses to be granted by the United States to private persons or corporations, or to municipal or state agencies.

Secs. 19 and 20 of said act deal with the matter of rates and other phases of regulation of public services. They read as follows:

Sec. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation or a person, association or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control; Provided, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

Sec. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or con-

trolled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service, shall be reasonable, non-discriminatory, and just to the customer, and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative, to enforce the provisions of this section to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce, and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the *bona fide* purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the act to regulate commerce approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases. * * *

The intent of Congress is made plain in Sec. 19, that the Federal government shall scrupulously refrain from entering the sphere of regulation within any state which has itself established agencies for such regulation; but that the Federal Power Commission is to function as to this matter only in the absence of such state agency of control.

Sec. 20, however, lays down certain rules of general application and affecting the furnishing of power in *interstate commerce, and generated under a Federal license granted under this act.*

This section provides that when "said power" (i. e., power so generated) shall enter into interstate or foreign commerce, then rates charged

shall be reasonable, nondiscriminatory, and just to the customer, and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful.

It is further provided that, in event any state concerned has not established an agency to enforce the terms of this section, or if more than one state shall be concerned, and the states so concerned shall be unable to agree on services to be rendered or rates to be charged, then the Federal Power Commission shall act to enforce the terms of this section.

So far as the opinion of the Supreme Court of Rhode Island lays down any principle of general application, it would seem to be, in substance as follows:

1. A public service corporation engaged in generation and sale of electric power, either organized or doing business in a state having an established agency for control of rates for sale of such power, may make contracts with corporations of

another state, providing for sale of such power, for distribution in such other state, and contracts so made are not subject to the rate-making supervision of the state in which such power is generated.

2. That this principle or rule applies even though the operation of such contracts results in a financial loss to the producing corporation, to such an extent as to require that other purchasers of power within the state where generated must pay more than a fair price for such power, based on cost of production, in order to afford to such producing corporation a fair and reasonable return upon its invested capital.

A necessary corollary to the principle so laid down would seem to be fairly stated as follows:

3. Electric power generated in one state by a public service corporation of that state, may be sold by such corporation at the state line (or within the state where generated) to a public service corporation of another state, for distribution to consumers in such other state, and the state wherein such power is so generated is without right to regulate or prescribe the rate at which it shall be so sold. This because such sale would constitute interstate commerce, beyond the constitutional power of any state to control, and even though the Federal government has never exercised its constitutional power to regulate or control such activity.

While not pertinent to the case at bar, counsel earnestly ask that the court consider the natural effect of such freedom from regulation of corporations engaged in the generation of hydro-electric power in the semi-arid states of the West, where water is to the physical development and life of communities what blood is to the human body.

Under such freedom from restraint as is plainly contemplated by the decision of the Rhode Island court, it would become legally possible for a public service corporation operating in California to make use of a natural resource of that state (water), for production of electric power, and by the mere act of selling such power to a corporation of another state, for use in such other state, to evade *any* regulation of rates as to power so sold, by either state.

Counsel cannot believe that this court will care to recognize any such rule or principle, which would probably have such a wide effect in freeing from proper and reasonable legal restraint public service corporations which might be so conducted as to become instruments of oppression, beyond the control of any save Federal agency, as yet never established.

Going but a step further in the logical development of the thought, it would be possible for *both* such corporations, to evade control or regulation in matter of rates, by either state.

It is firmly established by court decisions that a public service corporation is entitled to a fair return upon its investment.

If, in the case before this court, there can exist no state control of the prices at which the Rhode Island company may sell and the Massachusetts company may buy, electric power generated in Rhode Island, for distribution and sale in Massachusetts, then no public utility commission of Massachusetts will have power to fix rates to be charged consumers in Massachusetts, by the company operating in that state, save as such rates are necessarily based upon the cost of the power to the distributing company; and that cost, under the theory of the Rhode Island Supreme Court, would be beyond the control of either state.

Hence it would follow that the necessary basis for the fixing of rates to consumers would be beyond *any* state or local regulation.

The thought which we here endeavor to express is that which we believe was in the mind of this court when it decided the case of Pennsylvania Gas Co. v. Public Service Commission of N. Y., 252 U. S. 23.

In that case it appeared that the company was engaged in transporting its gas from Pennsylvania into New York, where it distributed such gas directly to individual consumers. The rate to be charged consumers was fixed by the New York Commission, and the company protested the action, asserting that it was an attempt to regulate interstate commerce.

The opinion of this court was that, while the manner in which the company business was conducted gave it the status of interstate commerce, yet the distributing portion of the business possessed such a local character as must necessarily be subject to regulation in public interest, *by some agency*; that as Congress had not sought to exercise the Federal power to so regulate, the *ad interim* right of the state to regulate would not be denied.

The concluding paragraphs of the opinion in that case are as follows:

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the commerce clause of the Constitution.

The principles announced, often reiterated in the decisions of this court, were applied in the

judgment affirmed by the Court of Appeals of New York, and we agree with that court that until the subject matter is regulated by congressional action, the exercise of authority conferred by the state upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution.

At first glance, it might appear that two decisions are in opposition to the thoughts herein suggested, but careful analysis of those decisions will dispell any such impression.

In *Public Utilities Commission v. Landon*, receiver, 249 U. S. 236, Landon was receiver of the Kansas Natural Gas Co., a Delaware corporation.

The gist of the case was that the company had made contracts with certain local gas companies in Missouri and Kansas, whereby gas (mostly secured in Oklahoma) was conveyed into Missouri and Kansas, and there delivered into the mains of the local companies, for distribution to consumers.

In compensation for gas so supplied local companies, the distributing companies were to pay over to the supply company an agreed proportion of the retail sales price. Therefore, the local sales price to consumers measured the sales price as between the supply company and the distributing companies; but there was no privity between the supply company and the consumers.

The State Utility Commissions and various municipalities were sued by the receiver of the supply company, to prevent interference with an increase in the prices to be paid by consumers for gas consumed, such increase being alleged to be necessary for the purpose of securing to the supply company an adequate price for gas supplied.

It was held that the business of the supply company and its receivers was interstate business, and was therefore beyond control by State agencies; but that the interstate nature of the business ceased with delivery by the supply company of gas to the mains of the distributing companies; that the subsequent distribution and sale of the gas to the actual consumers remained intrastate business, and as such was subject to state control; that the effect of rates prescribed by state agencies for sale to consumers affected interstate commerce only indirectly, and therefore the fixing of such rates was a proper exercise of the power of the State.

Practically the same parties were later before the court in Missouri *ex rel.* Barrett v. Kansas Natural Gas Co., 265 U. S. 298. It appeared in that case that the Kansas Natural Gas Co. had raised rates to various distributing companies in Missouri and Kansas, and that effort had been made by state agencies to prevent such increase of prices.

It was again held that the transactions between the supply company and local distributors, constituted interstate commerce, not within the regulatory power of the states.

The case of Pennsylvania Gas Co. v. Public Service Commission (*supra*), 252 U. S. 231, was distinguished, and the court said:

The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with in-

terstate commercee, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different states. The transportation, sale, and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national,—admitting of and requiring uniformity of regulation. Such uniformity, even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and states concerned. See, for example: *Welton v. Missouri*, 91 U. S. 275, 282; *Hall v. De Cuir*, 95 U. S. 485, 490.

Attention is asked to one statement of a significant fact concerning the Kansas Natural Gas Co., found in the opinion in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S., 298, as follows:

The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities, not for consumption, but for resale to consumers.

The circumstance that in the late opinion, this statement was made would assuredly indicate that the fact stated was a material one. In short, the business of the Kansas Natural Gas Co. was a wholesale one, and was an interstate business. Seemingly it owed no obligation directly to consumers; it had no privity with them. *It was not itself a public service corporation*, entitled to have rates so fixed as to bring a reasonable

return upon its investment, a right recognized as inhering in the ordinary business of a public utility.

Had it appeared that the company was engaged in distributing gas directly to consumers, in the states of Oklahoma and Kansas, where the gas was produced, and had the agency of one of those states attempted to regulate the sales price, quite a different case would have been presented.

The above-quoted statement of fact, we believe, distinguishes the cases in which the Kansas Natural Gas Company was a party, from the instant case, where it plainly appears that the primary business of the Narragansett Company is that of generating and distributing electric power directly to consumers in the state of Rhode Island, as a public utility of that state.

This circumstance gives rise to certain obligation from the Narragansett Company to the consumer customers of Rhode Island, such as is necessarily subject to control by the state. If the company, by selling power at a loss to the Attleboro Company, finds itself where it must charge unduly high rates to its own consumer customers, then it fails to discharge its obligation to them.

It is therefore submitted that the cases of Public Utilities Commission v. Landon, Receiver, 249 U. S. 236, and of Missouri *ex rel.* Barrett, v. Kansas Natural Gas Co., 265 U. S., 298, are not controlling here, but should be distinguished; that the underlying theory applicable is found announced in Simpson v. Shepard (Minnesota Rate Case), 230 U. S. 352, 433, where this court said:

Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within

the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power,

and in Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23, where the same principle was laid down and applied.

The theory of the last two cases cited, applied to the instant case, would bring about a reversal of the decision of the Rhode Island Supreme Court, and it is submitted that such reversal should result.

Respectfully submitted,

CHAS. F. CONSAUL,
CHAS. C. HELTMAN,

*Attorneys for The Southern
Sierras Power Company,
amicus curiae.*

NEWMAN JONES,
Of Counsel.